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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~128~~. 340 50

JOHN N. A. GRISWOLD, APPELLANT,

vs.

ROWLAND G. HAZARD, ROWLAND HAZARD, ELIZABETH HAZARD, ELIZABETH HAZARD, TRUSTEE, ANNA HAZARD, AND LYDIA TORRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

FILED JUNE 22, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 626.

JOHN N. A. GRISWOLD, APPELLANT,

vs.

ROWLAND G. HAZARD, ROWLAND HAZARD, ELIZABETH HAZARD, ELIZABETH HAZARD, TRUSTEE, ANNA HAZARD, AND LYDIA TORRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

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a Circuit Court of the United States, District of Rhode Island.
In Equity.

No. 1087.

JOHN N. A. GRISWOLD
vs.
ROWLAND G. HAZARD *et als.* } No. 1.

Pleadings and Proofs.

Samuel R. Honey, Abraham Payne, for complainant; Edwin Metcalf, for respondents.

b United States Circuit Court, District of Rhode Island.

Bill in Equity.

JOHN N. A. GRISWOLD *vs.* ROWLAND G. HAZARD *et al.*

1 Be it remembered that on the 13th day of September, A. D. 1881, the following bill in equity was filed in the clerk's office of the circuit court of the United States for the district of Rhode Island:

JOHN N. A. GRISWOLD
vs
ROWLAND G. HAZARD *et als.* } No. 1089.

Bill of Complaint.

To the judges of the circuit court of the United States for the district of Rhode Island:

John N. A. Griswold, of the city, county, and State of New York, and a citizen of the State of New York, brings this his bill against Rowland G. Hazard and Rowland Hazard, both of South Kingston, in the State of Rhode Island; Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torrey, who reside in Newport, in the said State of Rhode Island; and all of whom are citizens of the said State of Rhode Island, and thereupon your orator complains that he has unlawfully been induced, in connection with one Thomas C. Durant and one S. Dexter Bradford, now deceased, to give his bond, conditioned for the payment of the sum of fifty-three thousand seven hundred and thirty-five dollars, on certain contingencies, to the said defendants herein, and the object of this bill is to have the said bond, as to himself, reformed, a copy of which bond is hereto annexed, marked Exhibit "A;" and your orator alleges that Isaac Peace Hazard, Sophia Vernon, Anna Horner, and Mary P. Hazard, named as obligees in the said bond, are all deceased.

And your orator, to show the court the grounds and reasons why he is entitled to have the said bond reformed as to himself,
2 makes the following statement, to wit: That on the twenty-second day of August, 1868, the said Isaac P. Hazard, on be-

half of himself and all other stockholders of the corporation known as the Credit Mobilier of America, filed his bill of complaint in the supreme court of Rhode Island against the said Thomas C. Durant and others, claiming therein that the said Durant was largely indebted to the said corporation of which the said Hazard claimed to be a stockholder, and that the said corporation had refused to bring suit against the said Durant, and praying therein, among other things, that a writ of *ne exeat* might issue against the said Durant, who was alleged in that part of the said bill which prays for a subpœna "to be of the State of Rhode Island," and who, the said bill alleged, intended soon to depart out of the State of Rhode Island, and the defendants herein other than the said Isaac P. Hazard, on their own application, alleging themselves stockholders of the said corporation, became parties complainant in said suit, a copy of which bill is hereto annexed, marked Exhibit "B;" that the said Durant was not at the time of filing the said bill or at any other time a citizen or resident of the State of Rhode Island, and the bill contains no allegation that he was ever in the State of Rhode Island other than as stated as aforesaid in the prayer for subpœna. The reason given why the said Durant was sued in Rhode Island rather than at his residence, in New York, is given by the said Rowland G. Hazard, one of the complainants in said suit, who, on April 21, 1875, states, in his affidavit of that date, that the reason why the said Durant was sued in the State of Rhode Island and not in the State of New York, as was originally designed, was because of the notorious corruption of the courts of New York and the reputed connection or relation of said Durant with some of the judges then presiding in the same, and your orator shows your honors that the said defendants could have avoided the courts of New York by bringing their suit in the circuit court of the United States for the southern district of New York, but did not do so, because they sought by the arrest of the said Durant away from home to obtain an unfair advantage over him.

3 That on Saturday, the 22d day of August, 1868, while the said Thomas C. Durant, then a resident and citizen of the city of New York and not of Rhode Island, was for the benefit of his health sailing in the yacht "Idler" on the high seas, and not, as your orator is informed and believes, within the boundaries of the State of Rhode Island, the said Isaac P. Hazard, expecting that the said Durant would land at Newport (the favored resort for the purposes of health of citizens of all the States of the Union), preferred his petition to the supreme court of Rhode Island, setting forth the fact that the said bill had been filed by the defendants herein and setting forth the object of said bill, and prayed in said petition that a writ of *ne exeat* be issued, restraining the said Thomas C. Durant from departing out of the jurisdiction of the said court until the further order thereof, a copy of which petition is annexed hereto, marked Exhibit "C;" and thereupon a decree was entered by the said court directing the issuance of a writ of *ne exeat* against said Durant.

That when the said Durant did, as anticipated by the said Isaac P. Hazard, on the evening of Saturday, August 22, 1868, land from

the said yacht onto the wharf at Newport, one William D. Lake, then the sheriff of the county of Newport, with a large posse, assuming to act under the said writ of "*ne exeat*" (a copy of which writ, marked Exhibit "D," is hereto annexed), seized the said Durant, a citizen of the State of New York and of the United States, and conveyed him to the jail of said county and there imprisoned him; that your orator, then a resident of Newport, having no interest, directly or indirectly, in the said Credit Mobilier, and having then had no business relations and only a slight acquaintance with the said Durant, being informed by a friend who was an acquaintance of the said Durant that the said Durant in coming to said Newport had on a Saturday night been cast into prison, and being then requested to become his bail, and supposing that as such bail he could at any time be relieved from all responsibility by the surrender of
4 his principal, and not doubting that the said Durant would always act honorably and on request make surrender of himself (the correctness of which opinion the conduct of said Durant has always verified), your orator agreed to become his bail, and as it had then become Sunday, the 23d of August, at which time it was thought a bond that would be binding and valid could not be executed, the said Durant was discharged from his imprisonment on your orator's promise that on Monday morning he would formally become his bail, and early on Monday morning your orator did sign a bond which he thought to be a bail bond for the appearance of the said Durant and for nothing more.

And your orator further shows unto your honors that the said suit of Hazard and others against the said Durant progressed slowly, your orator, of course, not being a party thereto and having little or no information as to what was being done therein until on or about April 10, 1879, when your orator was informed that the master, to whom the accounting between the parties complainant and defendant had been referred, either had reported or was about to report adversely to the said Durant, when your orator filed his petition in the said supreme court of Rhode Island, as that was the only court where a surrender could be made, asking permission to surrender the said Durant into the custody of the said court and to be relieved from the said bond executed by your orator, which petition the said court recently refused to grant to your orator, and, while not so deciding or adjudging, did intimate an opinion that your orator might be bound, in the event of a decree against the said Durant, to pay the same, to the amount of fifty-three thousand seven hundred and thirty-five dollars, on which intimation being given, your orator determined to file this bill, as he has good right to do, not for liberty to surrender the said Durant, as the said petition prayed, but to have the said bond reformed so as to conform with what he understood it to be when he executed it, namely, a bond for the ap-
5 pearance of the said Durant, that he might be subject to the orders and decrees of the said court, or, in any event, that a bond—to be dated when it shall be executed, and which shall be such as the sheriff has by law and the said writ of *ne exeat* (aside from the action of the parties) only ever been authorized to exact,

either from the said Durant or his sureties, namely, a bond conditioned that the said Durant will not go or attempt to go into parts beyond the State of Rhode Island without the leave of the said supreme court—may now be substituted for the bond given by your orator.

And your orator respectfully insists that he is, according to the well-established principles of equity, entitled to have the said bond reformed as aforesaid, because the bond in its present form is the result of a violation of law, of fraud and concealment on the part of the defendants herein, and of a mistake, which is most apparent, on the part of your orator.

Violation of law. Your orator insists that it was a violation of law for the defendants to sue out a writ of *ne exeat* against the said Durant—who neither when the bill of complaint or the petition for the said writ was filed was a resident or citizen of the State of Rhode Island and who neither the bill or petition alleges to have at any time been within the boundaries of the State of Rhode Island—knowing or believing that the said Durant was about to come to Rhode Island, and that as his home was in New York he must soon leave Rhode Island, the said defendants averred in their bill that the said Durant is about to depart out of the State of Rhode Island and out of the jurisdiction of the court. This your orator submits was a violation of law and a perversion of the writ, and is a form of arrest and imprisonment that can be practised, if tolerated, on citizens of other States than Rhode Island, but not upon citizens of that State, for as to citizens of that State it cannot be said that they are about to depart out of the State merely because their homes are elsewhere, for their homes are not elsewhere, and yet the citizens of the several States have the constitutional right to be
6 treated equally, as provided by art. IV, sec. 2, of the Constitution of the United States; and your orator submits that if this use of the writ of *ne exeat* be sanctioned any creditor or any one who claims to be a creditor, no matter where his residence, knowing that his debtor contemplates coming to Newport, can file his bill stating that his debtor is soon to depart from the State of Rhode Island, obtain a writ of *ne exeat*, and keep such debtor away from his home, his property, and his business for years, and even perpetually, unless he gives security for the payment of the alleged debt; and your orator submits that such procedure is an invasion of United States citizenship, which it is the peculiar province of this court to protect.

And your orator further insists that the bond was taken in violation of law, because the writ of *ne exeat* directed the sheriff to take "bail or security in the sum of $53,735 that he, the said Thomas C. Durant, will not go into parts beyond this State without the leave of our said court," and it was by the writ, only in the event of a refusal to give such bail or security, that the sheriff was authorized to imprison him, while the bond that the said sheriff did exact and take from your orator was a bond conditioned that "the said Thomas C. Durant shall on his part abide and perform the orders and decrees of the supreme court of the State of Rhode Island in the said suit."

And your orator respectfully submits, by reason of the fact that the said Durant is not alleged to have been (either permanently or temporarily) within the State of Rhode Island when the bill or petition was filed, and by reason of the fact that the sheriff required a different and much more exacting bond than the writ directed him to take, the bond would be void both as to the said Durant and your orator, and but for one fact (which in no manner validates the said proceedings or the said bond so far as the same affect your orator) would be so declared, which fact is this, that while the said
7 Durant was so in custody or at some other time on or prior to August 24, 1868 (the date of the bond signed by your orator), the said Durant, by his solicitor in the said suit, and the said Isaac P. Hazard, by his attorney therein, entered into an agreement which is in the words and figures following, to wit:

NEWPORT, *sc.*:

Supreme Court. In Equity.

ISAAC P. HAZARD *et al.* } No. 2.
vs.
THOMAS C. DURANT *et al.* }

In the above-entitled case it is agreed that said Thomas C. Durant shall file a bond, with surety in the penalty marked in the writ of *ne exeat* therein, to abide and perform the orders and decrees of the court in said cause, and that thereupon the writ of *ne exeat* aforesaid shall be discharged, and that the court may enter decree accordingly.

FRANCIS B. PECKHAM, JR.,
Complainants' Att'y.
CHAS. C. VAN ZANDT,
Solicitor with T. C. Durant.

And your orator expressly states that neither on the 22d or the 24th of August, 1868, did he know or hear anything of this said agreement, and that he had not until about filing his petition for liberty to surrender the said Durant, in April, 1879, any knowledge of the said agreement, and is in no manner affected by it.

And your orator further insists that the said bond should be reformed as to him, because it was obtained from him in its present form by a fraud practiced on him by the defendants herein. Fraud.

The said defendants well knew that your orator would not become a party to a bond which was the result of a private agreement
8 whereby your orator, as is claimed, became the surety for the debt of a comparative stranger to the amount of $53,735, and therefore the said defendants concealed from your orator the fact that the bond was other than a bail bond in form or in legal effect, and also concealed the fact of the existence of the said agreement and the effect thereof, and your orator submits to your honors that it is a well-settled principle that where a creditor conceals from

the surety of his debtor an important fact relating to the transaction he commits a fraud on the surety which avoids the bond as to him.

And your orator further submits that the defendants, knowing that the effect of the bond given under the agreement was different from such bond as the sheriff without any agreement was authorized to take, concealed from your orator the legal effect the agreement had on the bond signed by him, and by so doing violated a well-settled principle of equity and committed a fraud against your orator; and your orator further shows unto your honor that the said writ as well as the precedents require the bond to be taken by—that is, to be given to—the sheriff, and that for the reason that the bond taken is only in certain contingencies to inure to the benefit of the party suing out the writ, but the said bond was made payable directly to the complainants in said suit, the defendants herein, and this, your orator submits, was done to give the transaction the appearance of a voluntary contract and to effectuate the fraud the said defendants were perpetrating, of obtaining from your orator (a stranger to the parties) security for a claim of more than $53,000, while at the same time the bond was filed in the court so as to make the giving of the bond appear as one of the orderly procedures in the suit, and thus relieve it from the defence of having been obtained by duress, and in that way alone did the bond become a file of the said court.

And your orator further shows unto your honors that the bond taken by the sheriff, if, as claimed to be, a bond securing the
9 debt, is much more onerous and exacting than that which the sheriff was authorized to take, and would unquestionably have been void, even as against the said Durant, but for the said agreement, for it is well settled that bonds given in the administration of justice must only be such as the law requires and must be "*strictissimi juris*," and as your orator had no knowledge of the agreement which may validate the bond as to Durant the bond is nevertheless void as to your orator.

Your orator submits to your honors that all the sheriff could demand was a bond conditioned that the said Durant would not leave the State, and the court, according to precedent, on a motion that Durant be at liberty to depart from the State, would have given him leave to depart on his giving a bond that he would answer the bill and make himself amenable to the process of the court during the progress of the suit, and to such process as might be issued to compel the performance of the final decree, and in no event could a bond, with a security to pay the debt, be lawfully exacted; and your orator further shows unto your honor that while the writ commanded the sheriff to "distinctly and plainly make return to the court of what security he had taken," he (either by his own neglect or by advice) made no return whatever of the transaction, but simply stated by way of return that he had arrested Durant, and that the writ was discharged; and your orator further shows that the said defendants, in compliance with the terms of the said agreement dated August 24, 1868, hereinbefore set forth, without the

knowledge of your orator, did on that day enter a rule discharging the said writ of *ne exeat;* which rule is in the words following, to wit:

NEWPORT, *sc:*

Supreme Court. In Equity.

I. P. HAZARD *et al.*)
vs.) (No. 2.)
THOS. C. DURANT.)

10 Thomas C. Durant, one of the defendants in this suit, having executed and filed a bond, with sureties, to abide and perform the orders and decrees of the court made in this suit—

It is now, by consent, ordered that the writ of *ne exeat* heretofore issued be discharged.

Aug. 24, 1868.

E. R. POTTER,
Ass. Jus. Sup. Court.

And your orator shows to your honors that the said defendants by discharging the said writ placed the said Durant entirely beyond the control of your orator. If the bond be taken to be security for the debt there is nothing in the fact of its having been given or in its terms that discharges the writ.

Your orator respectfully insists that the office of the bond given by your orator was to free the said Durant from imprisonment and not to discharge the writ, and had not the writ been discharged your orator, acting either in his own name as the equitable bail of the said Durant or acting by permission of the court in the name of the said defendants, could under said writ have brought the said Durant before the court to "abide by and perform the orders and decrees of the court," according to the terms of the said bond, and your orator submits that the defendants by discharging the said Durant entirely from the control of said writ placed him beyond the control of your orator, and by discharging the principal freed your orator (his alleged surety) from all obligation.

Your orator therefore submits that the bond in question was obtained from him by the fraud of the defendants, which fraud consists of the facts following: That said defendants sued out a

11 writ of *ne exeat* on the allegation that the said Durant was soon to depart from the State, which allegation was sustained only by the fact that the said Durant contemplated coming to the State; that the presentation of the bond in question by the sheriff to your orator for his signature as an indispensable prerequisite to the discharge of the said Durant from imprisonment was a fraudulent violation of the instructions of the writ and of the law; that a private agreement was entered into by the said defendants with the said Durant which alone could validate the bond, and that important fact, as well as its legal effect, was fraudulently concealed from your orator; that while the writ commanded the sheriff distinctly and

plainly under his hand to return that he had taken the agreement from Durant, the said sheriff (either by his own neglect or at the instigation of the defendants) concealed the fact that a private agreement had been made by the parties and a bond given, as claimed, for the payment of the debt; that the said defendants, in order that the said bond might not be invalid because of their failure to carry out their part of the agreement, without the knowledge or consent of your orator, discharged the said writ, so that your orator might not be able to move the said court to take such action as would secure to said defendants all the rights the said writ conferred on them, and thus no breach of the condition of the bond occur, but discharged the said writ, so that your orator's only relief should be the payment of the debt; that the defendants, while they knew that your orator thought he was only giving "bail" (the term used in said writ) for the appearance of the said Durant, concealing the truth as to fact and law, managed to obtain your orator's signature to a bond which it is claimed is, by virtue of the agreement, valid, and which is claimed to be a bond for the payment of the debt.

Mistake. 12

And your orator further respectfully submits to your honors that if the said proceedings were all legal and in good faith and free from all actual or constructive fraud your orator is, according to well-established equity principles, entitled to have the said bond reformed, if no other reason existed, because the same was executed by your orator by mistake.

And your orator here protests that the legal effect of the condition of the bond in question, to wit, "that the said Durant shall abide by and perform the orders and decrees of the court," is not that your orator and his cosurety (who is since deceased without leaving any estate) or either of them shall pay the debt on the said Durant's failure to do so, and insists that had such been the intent the bond would have in plain words provided, in the event of his failure, for the payment of any decree against Durant to the amount of $53,735,. but insists that the said bond simply means that the said Durant shall, as any other defendant, be subject to the court, and to any process it may issue to compel the performance of the final decree; but while thus protesting and claiming, yet as soon as a doubt was expressed whether the bond in question might not be construed to be security for the debt, your orator felt it to be his right and his duty without any delay to file this his bill to have the said bond so reformed that it will be a bail bond, as your orator understood it was, as the writ terms it, and as all the circumstances show it was understood to be, conditioned for the appearance of the said Durant "that he may be compelled to abide by and perform the orders and decrees of the court," as citizens of Rhode Island are required to do, which appearance your orator has always been ready to effect, or that a *ne exeat* bond, to bear date when it shall be executed, conditioned, according to the direction of the writ, "that the said Durant will not go or attempt to go into parts beyond the State without the leave of the court," be substituted for the bond given by your orator; and if your honors adjudge that such substitution be made, then your orator

is content that the said substitution be made on the condition that when the *ne exeat* bond is given the said Durant shall be within the State of Rhode Island, so as to be amenable to its courts; but
13 your orator respectfully submits that he should only be called on to execute a bail bond, as the bond given was understood to be.

And your orator avers that at the time of giving the said bond the said Durant was a comparative stranger to him; that he had then had no business or other dealings with him; that he neither received nor asked any security, pledge, or compensation from said Durant on becoming his bail; that he was asked to go bail for the appearance of one visiting Newport, who, on a Saturday night, away from home, had been cast into prison; that your orator's motives were those of common humanity, together with some regard for the good name among visitors of the community in which he resided, and, to gratify these motives, your orator, knowing that bail could always surrender their principal, was willing to run the risk of being called on to pay the penalty if he did not appear; but your orator insists that it is absurd to suppose that any man of ordinary business capacity, and who was possessed of such estate as rendered him responsible, would, without any security or any writing whatever, voluntarily become security for the payment of a debt of $53,735 for the benefit of the parties to this transaction.

And your orator on his oath saith that he acted on his own judgment, not doubting but that he was being dealt fairly with; was not asked by any one to become surety for the payment of that or any other debt, and that he did not understandingly become such surety, but that he was asked to become bail for the appearance of the said Durant and consented thereto, and to nothing else, and that he had no counsel present.

And your orator further submits that he is advised that, in any event, all that was necessary to relieve the said Durant from imprisonment was that he should give bond with surety that he would not leave the State, and not that he should give security for the payment of the debt, and that if the said Durant, by giving a
14 bond not to leave the State, had been relieved from his imprisonment he could on application to the court have obtained liberty to depart from the State without giving security for the payment of the debt, but by giving a bond conditioned that he would answer the bill and be amenable to the processes of the court; and your orator is further advised that the law of the land, recognizing that men are moved by rational motives, has established it as a principle to assume that a surety did not enter into an obligation greater or more onerous than the law required, even if the words of the obligation import more than the law required, and that even in the case of a *ne exeat* bond, where the condition is more exacting (as in this case) than the law requires, the courts will not enforce the bond, and that courts of equity, when a mistake in a bond can be faily implied from the nature of the transaction, will give relief even without the mistake in fact being expressly established, but

your orator submits that in this case the circumstances and your orator's statement herein made do expressly establish the mistake.

And your orator charges, upon information and belief, that the said Thomas C. Durant and the estate of the said S. Dexter Bradford, deceased, are hopelessly insolvent, and your orator avers that he has been always ready and willing when required and has expressly offered to the said defendants to produce the body of the said Thomas C. Durant and deliver him up to the said supreme court of Rhode Island, to be dealt with as to law and justice should pertain, and has been always ready and willing to execute a bond to the said defendants, conditioned for the appearance of the said Durant in the said cause, and is willing, if your honors think he should be required so to do, to substitute a bond, to bear date when executed and conditioned according to the directions of the said writ, to be substituted for the bond given by your orator.

And your orator further shows that he has requested the
15 said Rowland Hazard, Rowland G. Hazard, Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torrey to deliver up the said bond to be reformed and rectified, with which just and reasonable request the said complainant well hoped that the said respondents would have complied, as in justice and equity they ought to have done.

But now so it is, may it please your honors, the said defendants wholly neglect and fail so to do, and pretend that the said bond binds your orator to the payment of such decree in the suit aforesaid as may be rendered against the said Durant (provided he shall fail to pay the same) to the extent of the penalty of the said bond, and have declared their intention of suing your orator at law upon the said bond for the penalty thereof as soon as a final decree shall have been rendered against the said Durant, whereas your orator expressly charges that the said bond was intended to stand only for the production of the body of the said Durant when the same should be required.

And the said defendants well knew at the time of executing the said bond that your orator would not have entered into the same if he had been made aware that it was intended to bind him to pay the amount of such decree as might be rendered in the said suit against the said Durant to the extent of the penalty of the said bond, and for that reason concealed from your orator the intended effect of the said bond; all of which actings and pretences of the said defendants are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator. In tender consideration whereof and forasmuch as your orator is without adequate remedy in the premises by the strict rules of the common law and without the assistance of this honorable court, where matters of this nature are particularly cognizable and relievable—

To the end, therefore, that the said defendants may answer the
16 premises, and that the said bond may in its present form be set aside as having been obtained by fraud and imposition and by the mistake of your orator, or that the same may be reformed and rectified by omitting the condition thereof and by in-

troducing a condition that the body of the said Durant shall be produced when required by said supreme court of Rhode Island, or that a *ne exeat* bond, to bear date when it shall be executed, conditioned according to the directions of the said writ, be substituted for the bond signed by your orator; and that the said Rowland Hazard, Rowland G. Hazard, Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torrey may be restrained by the writ of injunction of this court from suing your orator at law for the penalty of the said bond for the breach of the condition of the same by the said Durant in not paying such decree as may be awarded against him by the said supreme court of Rhode Island in the said suit, and from in any manner enforcing the said bond in its present form; and that your orator may have such other and further relief as to your honors may seem meet and the justice of the case shall require—

May it please your honors to grant unto your orator, not only a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said Rowland Hazard, Rowland G. Hazard, Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torrey, to restrain them and each of them from suing your orator at law upon the said bond or in any manner enforcing the same in its present form, but also a writ of subpœna, to be directed to the said Rowland Hazard, Rowland G. Hazard, Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torrey, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises (their oaths thereto being hereby waived), and further to stand to, per-
17 form, and abide such further orders, directions, and decrees therein as to your honors shall seem meet.

And he will ever pray, &c.

JOHN N. A. GRISWOLD.

SAMUEL R. HONEY,
ABRAHAM PAYNE,
FREDERICK T. FRELINGHUYSEN,
Solicitors for Complainant.

STATE OF RHODE ISLAND, } *ss:*
Newport, }

On this twenty-fifth day of August, 1881, before me personally appeared John N. A. Griswold and made oath that he had read the above bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

SAMUEL R. HONEY,
Notary Public.

18 EXHIBIT "A."

Know all men that we, Thomas C. Durant, as principal, and John N. A. Griswold and S. Dexter Bradford, as sureties, are firmly bound to Isaac P. Hazard, Rowland Hazard, Rowland G. Hazard, Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, Mary P. Hazard, Lydia Torrey, Sophia Vernon, and Anna Horner in the sum of fifty-three thousand seven hundred and thirty-five dollars, to be paid said obligees, their executors, administrators, or assigns; to which payment we bind ourselves, our several and respective heirs, executors, and administrators, jointly and severally, hereby.

Sealed with our seals and dated this 24th day of August, A. D. 1868.

The condition of this obligation is that said Thomas C. Durant shall on his part abide and perform the orders and decrees of the supreme court of the State of Rhode Island in the suit in equity of Isaac P. Hazard and others against said Thomas C. Durant and others, now pending in said court within and for the county of Newport.

THOMAS C. DURANT. [L. S.]
J. N. A. GRISWOLD. [L. S.]
S. D. BRADFORD. [L. S.]

Executed and delivered in presence of—
FRANCIS P. PECKHAM, JR.

Endorsed: Isaac P. Hazard *et als.* and Thomas C. Durant *et als.* *Ne exeat* bond. Filed Aug. 24, 1868. Thomas W. Wood, clerk.

18*a* EXHIBIT B.

NEWPORT, *sc.*:

Supreme Court. September Term, 1868.

ISAAC P. HAZARD *et al.* *vs.* THOMAS C. DURANT *et al.* } Bill in Equity, No. 2.

To the honorable justices of the supreme court of the State of Rhode Island within and for the county of Newport:

Isaac P. Hazard, of the city and county of Newport, in the State of Rhode Island, brings this his bill of complaint against Thomas C. Durant, Oliver Ames, Benjamin E. Bates, John Duff, Cornelius S. Bushnell, Sidney Dillon, Henry S. McComb, and "The Credit Mobilier of America," and "The Union Pacific Railroad Company."

And thereupon, humbly complaining for himself as one of the stockholders in the said defendant corporation, "The Credit Mobilier of America," as also for other such stockholders in said corporation as may become parties to this his bill of complaint, your

orator says that the said defendant corporation, The Credit Mobilier of America, was created, under the laws of the State of Pennsylvania, for the purposes and with the powers fully set forth in its act of incorporation and other acts relating thereto, copies of which, marked Exhibit A, are hereto annexed and made part of this bill of complaint.

That the said defendant corporation, The Union Pacific Rail-
18*b* road Company, was created by acts of Congress for the purposes and with the powers fully set forth therein, copies of which said acts, marked B, are hereto annexed and made part of this bill of complaint.

That your orator from August, 1865, was a stockholder in the Credit Mobilier of America aforesaid, and from April, 1866, in the Union Pacific Railroad Company aforesaid, and since said dates, respectively, was and still is a stockholder in each of said corporations, and now owns and holds shares in the said Credit Mobilier of America of the value at par of thirty-eight thousand dollars, and shares in the said Union Pacific Railroad Company of the par value of —— dollars.

And your orator, further complaining, says that on the 16th day of August, 1867, the said defendant corporation, The Union Pacific Railroad Company, made a contract in writing with Oakes Ames, of North Easton, in the State of Massachusetts, for certain work to be done and material to be furnished in the construction of a large portion of its railroad and telegraph line at certain prices and on certain terms and conditions fully set forth in said contract, a copy of which, marked C, is hereto annexed and made part of this bill of complaint.

That on the 17th day of October, 1867, the said Oakes Ames, by an agreement in writing between himself, as party of the first part, the said Thomas C. Durant, Oliver Ames, John B. Alley, Sidney Dillon, Cornelius S. Bushnell, Henry S. McComb, and Benjamin E. Bates, of the second part, and the said Credit Mobilier of America, of the third part, assigned said contract with the said Union Pacific Railroad Company of August 16, 1867, to the said parties of the second part in trust for various purposes, and especially stipulating that the profits arising from said contract so assigned should be paid to the then stockholders of the said Credit Mobilier of America in proportion to the shares therein held by them, respectively,
18*c* as fully set forth in said agreement or deed of trust, a copy of which, marked Exhibit D, is hereto annexed and made part of this bill of complaint.

And your orator avers that large profits, in addition to those before mentioned as made by said Credit Mobilier, have been made under and by virtue of said contract so assigned, and the same and portions thereof have been paid over to some or all of the stockholders in the said Credit Mobilier of America entitled to the same by the said parties of the second part named in said Exhibit D, or by such of them as continue to act as trustees, and the said defendant, John Duff, who has been substituted as trustee under said agree-

ment or trust deed in place of John B. Alley, therein named, as your orator is informed and believes.

That your orator has received a share of said profits, and that, as he is informed and believes and therefore charges, the said defendant, Thomas C. Durant, has received from said trustee a large share of the profits arising from said contract, the same having been paid to him as a stockholder in the said Credit-Mobilier of America holding a great number of shares therein, and that, as your orator is informed and believes and therefore charges, the said Thomas C. Durant has become and is now the holder and nominal owner of a large amount of the stock and bonds of the said Union Pacific Railroad Company transferred and delivered to him by the said trustees as and for a part of his share in the profits aforesaid.

And your orator, further complaining, says that the said defendant, Thomas C. Durant, was, from the early part of the year 1864 until May 18, 1867, the president of the said defendant corporation, The Credit Mobilier of America, and had to a great extent the management and control of its affairs and the confidence of the trustees and directors thereof, and was able to direct and control its funds and finances, its payments and disbursements, and that the treasurer, clerks, and agents of said corporation were in the habit of
18*d* paying and did pay as he directed any and all sums of money, and upon vouchers or without vouchers, as were by him ordered and directed.

And your orator further states that the said defendant, Thomas C. Durant, had no rightful power and authority to receive from the said corporation, its officers, agents, or servants, or to cause or direct to be paid by them, any sums of money as aforesaid, except for the use of the said corporation and to be applied in and about its legitimate business.

And your orator is informed and believes and therefore charges that the said Thomas C. Durant in all instances in procuring moneys from the said corporation, its treasurer, clerks, or agents, or in causing or procuring moneys to be paid by the said corporation, its treasurer or other officer or agent, whether to himself or to any other person, represented and pretended to the directors, officers, and agents of the said corporation that such moneys were required and were to be used and were used for the benefit of the said corporation and in and about its legitimate business, and that upon such representations, which were by the said corporation, its officers and agents, believed to be true, as your orator is informed and believes, he, the said defendant, Thomas C. Durant, did, between May, 1864, and January, 1868, receive and cause to be paid to himself and other persons on his orders and by his directions, of and from the funds and moneys of the said corporation, very large sums of money, amounting in the whole, as your orator believes and charges, to more than a quarter of a million dollars, which he deceitfully and fraudulently applied to his own uses and purposes.

And your orator further says that he is informed and believes that it appears by the books and records of the said corporation kept by its clerks and servants, and that in fact the said defendant, Thomas

C. Durant, procured and caused to be paid to him and to others, for his use and benefit, by the officers and agents of the said
18e corporation, and of and from its funds and moneys, the several sums of money specified in the schedule hereto annexed and marked Exhibit E and made part of this bill, and at the dates and time therein mentioned, and that the said several sums of money hereinbefore mentioned were and each of them was so procured by the defendant, Thomas C. Durant, by means of his said office of president, and upon the false and fraudulent representations and pretence that the same had been by him paid for the benefit of said corporation or in the promotion of its business or the furtherance of its interest, or were required to be paid to and for the use of the said corporation or to some person or persons having just and legal claims and charges against the same for said amounts, respectively, and that each and all of said sums were required to be paid and were paid in and about the business of the said corporation and for its use and benefit; which representations, as your orator is informed and believes, were by the said corporation, its officers and agents, believed to be true, whereas your orator is informed and believes and therefore charges that the said representations and pretences so by the said defendant, Thomas C. Durant, made as aforesaid were and each of them was false and unfounded, and known to be so by the said Thomas C. Durant, and that each and all said sums of money hereinbefore mentioned were so procured by him with intent to defraud the said corporation, your orator, and other stockholders therein and to convert the same to his own use, and that the same were by the said defendant, Thomas C. Durant, so converted and applied to his own use.

And your orator further charges, on information and belief, that the said defendant, Thomas C. Durant, has never rendered any account showing a proper disbursement of the moneys hereinbefore mentioned or any part thereof for the benefit of the said corporation or in and about its business, nor furnished the said corporation with any proper vouchers for said moneys or of the payments thereof in its said business, nor in any manner accounted for or paid over the same or any part thereof, and that he is indebted to the said corporation in the full amount of all said moneys, with interest.

18f And your orator, further complaining, says that between October, 1864, and January, 1868, the said defendant, Thomas C. Durant, paid to the said corporation, the Credit Mobilier of America, and was credited on its books with large sums of money as paid upon his subscriptions to its capital stock or the subscriptions of other persons thereto transferred to him, and that large parcels of said stock have been by him transferred to or into the names of other persons upon the books of said corporation, and that, as your orator is informed and believes, there are now standing on the books aforesaid, in the name of the said Thomas C. Durant, 5,658 shares of said stock, of the par value of $565,800, for which he is credited upon said books with full payment therefor, and said stock is of the full actual value aforesaid, or very near to the said amount.

And your orator is informed and believes and therefore charges that a very large portion of said moneys so as aforesaid fraudulently converted or procured by the said defendant, Thomas C. Durant, as aforesaid, has been by him directly or indirectly appropriated and applied to the payments for said stock so by him held as aforesaid; and your orator is advised and therefore claims and insists that the said corporation and its stockholders have an equitable lien upon said stock of the said Thomas C. Durant to the amount of the moneys so by him fraudulently applied to payments therefor as aforesaid, and that the said stock and its proceeds are the rightful property of said corporation, the said Durant, an agent of said corporation, having, in breach of his trust, invested their moneys therein.

And your orator, further complaining, says that the said defendant, Thomas C. Durant, was active in promoting the organization of the said corporation, the Credit Mobilier of America, and that on or about the 24th day of November, 1864, he presented to the officers and agents of the said corporation a claim for forty-six thousand dollars as for so much money paid to one H. C. Crane for the expenses incident to such organization, and caused and pro-
189 cured himself to be credited upon the books of the said corporation with said amount, as your orator is informed and believes and therefore charges, in part payment of ninety-five per cent. on five hundred shares in the capital stock of said corporation, and the same was allowed to him by and in behalf of the said corporation as and for so much money paid thereto.

That the said Henry C. Crane was and ever since has been a confidential clerk in the employ of the said Thomas C. Durant; and your orator is informed and believes and therefore charges that no sum whatever was claimed by or paid to the said Henry C. Crane for any service or disbursements in and about the organization aforesaid, and that his name, if used in any way therein, was so used for the sole benefit of the said Thomas C. Durant and by way of cover and concealment of the connection of the said Thomas C. Durant with said transaction.

And your orator is further informed and believes that the whole expenses and disbursements connected with the said preliminary organization of the said corporation as aforesaid did not exceed the sum of sixteen thousand dollars, and that at least thirty thousand dollars of the amount so claimed by the said defendant, Thomas C. Durant, and credited and allowed to him as aforesaid was falsely and fraudulently claimed, and that, at most, he was entitled only to be credited with said sixteen thousand dollars, and that he is justly indebted to the said corporation in said sum of thirty thousand dollars, with interest thereon, and that the same is an equitable lien and charge upon the shares of the said Thomas C. Durant in the said corporation to that amount, and that stock of the amount of said thirty thousand dollars, with the dividends, income, and profits upon and from stock since said pretended purchase by said Durant and which may hereafter accrue therefrom, are the rightful property of said corporation and of its stockholders.

And your orator, further complaining, says that prior to the organization of the said corporation as aforesaid and before it
18*h* was capable of contracting with said corporation, the Union Pacific Railroad Company, and while its said organization was in contemplation, for the purpose of aiding in the construction of said company's railroad, your orator is informed and believes that the said Thomas C. Durant, consulting and professing to act in concert with others, who subsequently became members of and stockholders in the said corporation upon its organization being completed as aforesaid, and being then vice-president of and active in the management of said railroad company, caused and procured a contract to be made between the said Union Pacific Railroad Company and one Herbert M. Hoxie for the doing of certain work in and about the construction of said railroad, for the prices therein agreed to be paid therefor.

That the said Hoxie was but the instrument and agent of the said Thomas C. Durant and had no interest in said contract and no control over the same, and never did any work under the contract or advanced any moneys therefor, but his name was used therein only as a cover and to conceal the connection of the said Durant with said transaction, he, the said Durant, representing at the time to his associates and the directors and stockholders of the Credit Mobilier of America aforesaid and assuring them that the said contract was in truth and in fact taken and held for the benefit of the said last-mentioned corporation, and to be assigned and transferred to such corporation when it should by organization under its charter become capable to accept and undertake the same.

That, as your orator is informed and believes, prior to March, 1865, when said contract was in form assigned to and assumed by the said corporation, the Credit Mobilier of America, there had not been to exceed one hundred thousand dollars expended thereon or earned under the same, and that said one hundred thousand dollars had been advanced and paid by the said corporation, its agents or stockholders, and in its behalf and for its benefit, and not by the said Hoxie or the said Durant.

18*i* That on or about the tenth day of May, 1865, the said Durant presented to said corporation a claim for four hundred and twenty thousand seven hundred and seventy dollars as and for so much money due and owing upon said contract to the said Hoxie for work done, materials furnished, and expenditures made prior to the assignment thereof as aforesaid; and did falsely and fraudulently represent and pretend to the officers and agents of said corporation that said amount was justly due for actual expenditure and for money actually earned upon and under said contract prior to said assignment; and did fraudulently cause and procure said sum to be credited to him, the said Durant, upon the books of the said corporation as paid by him on that day upon and in part payment for five thousand nine hundred shares of the capital stock of the said corporation; and said sum, without lawful authority and by the fraudulent act and procurement of the said Durant, was so credited and allowed to him as and for so much money paid upon

his said stock, and he has had the full benefit thereof; and your orator claims and insists that the said Durant is justly indebted to the said corporation in the full amount of said sum, with interest thereon, and that the same is an equitable lien and charge upon the shares in the capital stock of the said corporation owned and held by him, and that the said stocks so purchased by the said Durant, with all the earnings, dividends, and income, and rights thereof, is the rightful property of said corporation and of its stockholders.

And your orator, further complaining, says that on or about the 20th day of November, 1866, the said defendant Durant caused and procured to be paid by the said corporation, the Credit Mobilier of America, upon the drafts of one A. N. Gesner, sixty thousand dollars under the false and fraudulent pretence and representation that the said draft was drawn upon the said corporation for some claim or demand justly due and owing by the said corporation—

18j Whereas in truth and in fact, as your orator is informed and believes and therefore charges, said draft was not so drawn or based on any legal claim, but was drawn and used, by direction and for the benefit of the said Durant, as a means whereby he might obtain that amount from the said corporation without consideration and to be used by him and applied to his own purposes in fraud of the said corporation and of your orator, and said sum was, in fact, received by the said Durant without consideration and by him applied in whole or part payment for his stock in the said corporation, and said sum was, on the day last aforesaid, by his fraudulent act and procurement, credited to his stock account on the books of the said corporation, and the said Durant has had the full benefit thereof; and your orator claims and insists that the said Durant is justly indebted to the said corporation in the amount aforesaid, with interest thereon, and that the same is an equitable lien and charge upon the stock by him held in the said corporation, and that the stock purchased with said money, with all the earnings, dividends, income, and rights thereto appertaining or which have been or may be derived therefrom, are the rightful property of said corporation and of its stockholders.

And your orator, further complaining, says that he is informed and believes and therefore charges that the pecuniary condition of the said defendant Durant is precarious; that he is and for a long time has been largely engaged in hazardous speculations and financial operations, and has sustained very heavy losses and is liable to sustain other losses, and your orator is fearful that any recovery had against him could not be collected by execution or other ordinary process of law, and that the said Durant is about to depart out of the State and out of the jurisdiction of this court; that the said corporation, the Credit Mobilier of America, has earned and divided among its stockholders large dividends upon the shares in its capital stock held and owned by them, respectively, said dividends having been payable and actually paid in money and in stock and bonds of the said corporation, the Union Pacific Railroad Company, large amounts of which have been assigned to the said defendant Durant as and for his share of dividends and earnings upon

18k the stock so as aforesaid held and owned by him in the said Credit Mobilier of America, and that he has received bonds of the said Union Pacific Railroad Company as and for such dividends to a very large amount, exceeding, as your orator is informed and believes, seven hundred thousand dollars, and has also received as and for such dividends stock of the said Union Pacific Railroad Company to the amount of nearly two million dollars, a large amount of which said stock is now standing in the name of the said Durant on the books of the said last-named corporation.

And your orator claims and insists that the said corporation, the Credit Mobilier of America, and your orator and others, stockholders therein, have an equitable lien and charge upon said stock and bonds so issued to the said Durant as and for dividends as aforesaid, for any amount which may be found due from him to them, or either of them, or to the said corporation, for or in respect to the causes of action mentioned in this bill of complaint, and that such lien should be enforced by decree of this honorable court, and that the said Durant should be directed to assign and convey to said corporation all stock, bonds, and money heretofore received by him as the proceeds of said stock so purchased by him with the proper moneys of said corporation.

And your orator further claims and insists that each and all said sums of money, shares, and stock and bonds as aforesaid are justly due and belong to the said corporation, the Credit Mobilier of America, and to your orator and others, stockholders therein, and that the said defendant, Durant, is justly indebted to the said corporation and to your orator and others, stockholders therein, in the full amount of said sum and value of said shares, stock, and bonds, and that the same are an equitable lien and charge upon said contract and agreement in the hands of the said defendants, trustees as aforesaid, and the shares, bonds, and dividends and earnings received or to be received thereon or therefrom by the said trustees to the extent of the interest of the said defendant, Durant, 18l therein, as hereinbefore fully stated and charged, and that the interest of said Durant in said agreement and trust deed and in the proceeds therefrom, so far as they purport to belong to or to be payable to the said Durant, are the rightful property of the said corporation and of its stockholders.

And your orator had well hoped that the said defendant corporation, The Credit Mobilier of America, would protect the rights and interest of its stockholders in the premises and, by proper proceedings at law or in equity, compel the said defendant, Thomas C. Durant, to account for said moneys wrongfully and fraudulently converted to his own use and withheld from said company as aforesaid, and that he would account for and pay over the same, and that said corporation would compel the said Durant to transfer all stock, bonds, moneys, and other rights and interest aforesaid procured with and by the proper moneys of said corporation to the same and to its stockholders; but now so it is, may it please your honors, that the said defendants, though requested so to do, have wholly neglected and refused to comply with these reasonable expectations and re-

quests of your orator; all of which actings, doings, and pretenses of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is entirely remediless according to the rules of the common law, and can only have relief in a court of equity—

To the end, therefore, that the said defendants may, upon their several and respective corporal oaths, full, true, direct, and perfect answers make, the complainants hereby waiving said Durant's oath thereto, to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were here repeated and they thereunto distinctly interrogated, and that not only as to their knowledge and remembrance, but also as to the best of their knowledge, information, and belief;

18*m* And that the said defendant, Thomas C. Durant, may come to a fair and just account with the said defendant corporation, The Credit Mobilier of America, and with your orator of and concerning all and singular the sums of money, stock and shares in capital stock, and bonds as aforesaid paid and delivered to or had or received by him as hereinbefore stated and charged, and may be decreed to pay over and deliver to the said Credit Mobilier of America and to your orator such sums of money, stocks, and shares and bonds as aforesaid as by such account shall appear to be justly due or belonging to the said corporation or to your orator, and to make such transfer of such shares and bonds as aforesaid as shall be necessary in order to fully protect the rights of the said corporation and of your orator in the premises;

And that the amounts so ascertained to be due as aforesaid be adjudged and decreed to be a lien and charge upon the shares in the capital stock of each of said corporations owned or held by or standing in the name of the said Durant on the books of said corporations, respectively, and upon the contract assigned as aforesaid to the said defendants, trustees as aforesaid, and the dividends, earnings, stocks, and bonds received under the same, or to be received by virtue thereof, to the extent of the shares thereof to which the said Durant may be entitled under said assignment; and that on default in the payment and delivery of the moneys, stock, and bonds so found due as aforesaid all such stock and bonds be sold under the direction of this honorable court, or otherwise transferred to and apportioned among the rightful owners and claimants thereof according to equity and good conscience; and that such stock, bonds, and moneys and interest and rights so procured by said Durant with the moneys of said corporation shall be deemed and taken to be the rightful property of said corporation; and that the said defendant, Durant, his agents and servants, be restrained from selling, assigning, transferring, pledging, or otherwise encumbering any stock or bonds in either of the said corporations owned or held by him or standing in his name on the books of either corpo-

18*n* ration, or received or held by the said defendants, trustees as aforesaid, for his use, or to be so received or held, or any right or interest in the contract assigned to said trustees as afore-

said, or any dividends on such stocks or bonds, whether in money, shares, or bonds or otherwise;

And that said Thomas C. Durant be enjoined from receiving or disposing of any dividends now or hereafter declared upon said shares of stock, and that the said defendant corporations be enjoined from paying over or delivering said dividends upon said shares of stock to said Thomas C. Durant, or upon his request, until the further order of this honorable court, whether said dividends be money, bonds, or stock or property of any kind;

And that the said defendant, Durant, be restrained from departing out of the State and out of the jurisdiction of the honorable court by writ of *ne exeat*, issued under the seal and by the order of this honorable court;

And that the said defendant corporations, their officers, agents, and servants, be restrained from suffering or permitting any shares or bonds so owned or held by or standing on the books of said corporations, respectively, in the name of the said Durant to be assigned, transferred, pledged, or otherwise encumbered, or any dividends to be paid thereon, whether in money, stock, or bonds or otherwise;

And that said defendants, trustees as aforesaid, be restrained from paying or delivering to or upon the order of the said Durant any dividends, earnings, shares, stock, or bonds by them held or to be held or received under the contract aforesaid assigned to them, or any pledge, transfer, or encumbrance of the same or any part thereof, or of any interest therein belonging to the said Durant or to which he may be or become entitled;

And that your orator may have such further or other relief as the nature of his case may require and to your honors shall seem meet—

180 May it please your honors to grant unto your orator the writ of injunction of this honorable court, directed to the said defendants, commanding the said Durant, his agents and servants, to refrain from selling, assigning, transferring, pledging, or otherwise encumbering any stock or bonds of either of said corporations owned or held by him or standing in his name on the books of said corporations, respectively, or received or held or to be received or held by the said defendants, trustees as aforesaid, for his use, or any interest in the contract assigned to them by Oakes Ames as aforesaid, and from receiving any dividends thereon, whether in money, stock, or bonds or otherwise, to which he may be or may become entitled; and also commanding the said corporations, their officers, agents, and servants, to refrain from suffering any assignment, transfer, pledge, or other encumbrance of the stock or bonds of the said Durant as aforesaid, and from the payment of any dividends as aforesaid; and further commanding the said defendants, trustees as aforesaid, to refrain from paying or delivering to or by order of the said Durant any dividends, earnings, stock, or bonds received or to be received under said Oakes Ames contract, or permitting any interest therein belonging to the said Durant or to which he may become entitled to be assigned or otherwise disposed of.

And also to grant unto your orator the writ of subpœna of this

honorable court, directed to the said defendants, Thomas C. Durant, of Newport; Oliver Ames, of North Easton; Benjamin E. Bates and John Duff, of Boston, in the State of Massachusetts; Cornelius S. Bushnell, of New Haven, in the State of Connecticut; Sidney Dillon, of the city, county, and State of New York; Henry S. McComb, of Wilmington, in the State of Delaware, and the said Thomas C. Durant, trustees as hereinbefore stated; the Credit Mobilier of America, a corporation created under the laws of the State of Pennsylvania, and having a place of business in Philadelphia, in said State, and also in said New York; and the Union Pacific Railroad Company, a corporation created by acts of Congress, and having a place of business in said New York; and Rowland G. Hazard, of South Kingston, in Rhode Island, commanding them on a certain day to be and appear before this honorable court, then and there to answer the premises, and to stand to, perform, and abide such decree and order therein as to your honors shall seem meet.

18*p*

ISAAC PEACE HAZARD.

NEWPORT, *sc.*:

NEWPORT, *August* 22, 1868.

Then came the above-named Isaac P. Hazard and affirmed (on peril of the penalty of perjury) that the statements contained in the foregoing bill are true, and that those statements therein made on knowledge and belief are true to his best knowledge and belief.

Before me— FRANCIS B. PECKHAM, JR.,
Justice of the Peace.

19 EXHIBIT "C."

To the Honorable Elisha R. Potter, one of the justices of the supreme court, now holding said court at Newport for the county of Newport:

Respectfully represents—

Isaac P. Hazard, of Newport, in the county of Newport, that he has filed in the clerk's office of said court for said county his bill of complaint against Thomas C. Durant, of said Newport; Oliver Ames, Benjamin E. Bates, John Duff, Cornelius S. Bushnell, Sidney Dillon, Henry S. McComb, the Credit Mobilier of America, and the Union Pacific Railroad Company, therein charging the fraudulent conversion of large amounts of money, stocks, and bonds of the said Credit Mobilier by the said Durant, and other acts to the injury of the said Credit Mobilier and of the complainant and other stockholders therein, and praying for an account, for an injunction restraining the defendants from paying or receiving such money, stocks, and bonds, and for a writ of *ne exeat* restraining the said Durant from leaving this State.

And the said complainant now moves that an injunction be granted, as prayed in said bill, during the pending thereof and until the further order of said court, and that a writ of *ne exeat* be issued restraining the said Thomas C. Durant from departing out of the

jurisdiction of said court until the further order thereof; and also that an order be made for service of subpœna on said bill and the citation on this motion on such of said defendants as do not reside and have no authorized agent in this State.

ISAAC P. HAZARD.

Sworn to in court this 22nd day of August, A. D., 1868.
THOMAS W. WOOD, *Clerk.*

Endorsed: Motion for injunction, &c. Isaac P. Hazard *vs.* Thos. C. Durant *et als.* No. 2. Motion granted. Writ of *ne exeat* to be issued for $53,735. Aug. 22, 1868. Thos. W. Wood, clerk.

20 EXHIBIT "D."

State of Rhode Island and Providence Plantations.

NEWPORT, *sc:*

To the sheriffs of our several counties or to their deputies, Greeting:

Whereas it is represented to our supreme court, sitting in equity, on the part of Isaac P. Hazard and others, complainants, against Thomas C. Durant and others, defendants, that said Thomas C. Durant is greatly indebted to the said complainant, and designs quickly to go into other parts beyond this State (as by oath made in that behalf appears), which tends to the great prejudice and damage of the said complainants: Therefore, in order to prevent this injustice, we hereby command you that you do, without delay, cause the said Thomas C. Durant to come before you and give sufficient bail or security, in the sum of fifty-three thousand seven hundred and thirty-five dollars, that he, said Thomas C. Durant, will not go or attempt to go into parts beyond this State without the leave of our said court; and in case the said Thomas C. Durant shall refuse to give such bail or security, then you are to commit him, the said Durant, to our county jail, in your precinct, there to be kept in safe custody until he shall do it of his own accord; and when you shall have taken such security you are forthwith to make and return a certificate thereof to our said court, distinctly and plainly, under your hand, together with this writ.

Witness George A. Brayton, Esq., at Newport, this twenty-
[L. S.] second day of August, A. D. eighteen hundred and sixty-eight.

THOS. W. WOOD, *Clerk.*

21 & 22 Endorsed.

Writ, Aug. 22, *ne exeat.* Isaac P. Hazard *et als. vs.* Thomas C. Durant *et al.* Filed Oct. 21, 1868. Thos. W. Wood, clerk.

NEWPORT, *sc:*

NEWPORT, *August 24th,* 1868.

I caused the within-named Thomas C. Durant personally to come

before me, as within commanded, on the 22nd day of this month; and now this writ is discharged by order of court.

WM. D. LAKE, *Sheriff.*

Fees:

Service		50 cents.
	$26	61 percentage on $53,235.
		10 travel.
	$27	21

23 *Answer of Rowland G. Hazard.*

The answer of Rowland G. Hazard, one of the defendants, to the bill of complaint of John N. A. Griswold, complainant.

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as he is advised is or may be material or necessary for him to make answer unto, answering, saith that the bond mentioned in said bill of complaint was lawfully procured and given; admits that suit was commenced in August, 1868, by Isaac P. Hazard, as stated in said bill; says that in said suit the said Durant was described as of Newport, in this State, and alleged to be about to depart out of this State and out of the jurisdiction of the supreme court of Rhode Island, and admits that the defendants in this suit became parties in said suit of Isaac P. Hazard, as stated in said bill.

And says that said Durant at the time of commencing said suit was temporarily residing in said Newport with the family of George Francis Train, with which family this defendant, on information and belief, avers he, said Durant, then and before and afterwards had his home in the city of New York and wherever else said family might be, and admits the truth of the reason referred to or alleged in said bill for suing said Durant in Rhode Island, and denies that any of these defendants have ever sought to obtain any unfair advantage over said Durant by arrest or otherwise.

And says that said Durant was so as aforesaid residing in said Newport when the petition for a writ of *ne exeat* was preferred to said supreme court, as stated in said bill, and that the appli-
24 cation for said writ was accompanied by an affidavit by this defendant, part of which is as follows, to wit: "And this affiant further says that he is one of the directors of the said corporation, and he positively avers that the said Durant is indebted and accountable to the said corporation for a large sum of money, amounting at least to $819,000, with the interest thereon, as set forth in said bill of complaint.

"This affiant further saith that said Thomas C. Durant is now temporarily a resident of Newport aforesaid, and that he is about to depart therefrom and to leave the jurisdiction of this court, his

business engagements being chiefly in the city of New York and on the line of the Union Pacific railroad; that his yacht, the Idler, now in the harbor of Newport, is ready and prepared for him to embark thereon and to take his departure from this jurisdiction;" admits that said Durant was arrested on said writ of *ne exeat* late on the evening of Saturday, August 22, 1868, and conveyed to jail; says that said Durant had not then just come to this State, but had left his said residence in Newport earlier that day for a pleasure sail up Narragansett Bay, and was returning from said pleasure excursion when so arrested; says that said writ was procured at about half past one o'clock in the afternoon of said day, and was served as soon as could be, earlier service being prevented by said Durant's said temporary absence from Newport; says that he does not know and cannot admit or deny, but leaves the plaintiff to prove, if he may, what acquaintance or relation the plaintiff then had with said Durant, what information he then received of said arrest, what he was thereupon requested or thereupon supposed or thereupon intended to do or expected said Durant to do; says that neither he, this defendant, nor any other defendant in this suit nor any party in said suit of Isaac P. Hazard and others, except said Durant, was present or took any part in the negotiations which resulted in the giving of said bond, but the obligees in said bond were represented in said negotiations by their counsel, Charles S. Bradley and Francis B. Peckham, Jr., and as to said negotiations this defendant can
25 answer only from information furnished him by said counsel, which information he believes to be true.

And upon said information and belief this defendant says that very soon after said Durant was lodged in jail, as aforesaid, a message was brought to said complainant's counsel that Durant and certain of his friends desired to see said counsel, who thereupon went forthwith to the jail at about midnight on said 22d of August, and found there with said Durant his counsel, Charles C. Van Zandt, and the two sureties on said bond; that negotiations for the discharge of said Durant from custody were then and there at once begun and were conducted by and between said counsel of the complainant and said counsel of Durant; that complainant's counsel pointed out the kind or form of bond required by the terms of the writ, but Durant, through his counsel, positively put aside the suggestion, saying that his business called him out of the State without delay, and that he could not conveniently remain in Rhode Island to move for and procure the discharge of said writ before the court; that it was then proposed that he should give the bond which is here in question, and that the writ should be wholly discharged; that this proposition was accepted with but slight demur, after some private conversation between Durant and his counsel and some explanation or conversation between those two and said sureties; that it was then quite midnight or very near it—too late to prepare any papers before Sunday—and this fact was mentioned by the counsel, and it was thereupon agreed that all should meet between twelve and one o'clock the next Monday morning at Mr. Peckham's office, in said Newport, and execute the said bond and the agreement to discharge

the writ, and that meanwhile said Durant should go at liberty upon his mere promise to attend the said meeting on Monday morning; that there was previously some debate among counsel about making said Griswold a special deputy sheriff to have the custody of said Durant until said bond should be executed on Monday, but
26 that this project was abandoned; that the amount of the bond was fixed by complainant's counsel at the same amount marked in the writ to avoid all appearance of hard dealing, though said amount was but a very small fraction of the claims sued in said litigation; that the effect and meaning of said bond—that is to say, that it would be security up to $53,735 for the payment or performance of any judgment of the court against Durant, and that the said sureties might be compelled to pay said sum if Durant should fail to perform or should violate any decree of said court—was clearly understood between the said respective counsel of the complainants and of Durant, and was, as complainant's counsel and this defendant believe, clearly made known to Durant by his said counsel, and by them communicated to said sureties; that the said sureties were near enough to hear all the said discussion between counsel, but they took no part in it, except when privately conferred with by said Durant and his counsel, and nothing passed between the said sureties and the complainant's counsel until the close of the interview, when Mr. Bradley, of the complainant's counsel, restated to all present the terms of the parol agreement that had just been concluded, namely, that said bond (briefly and truly describing it) and said agreement (briefly and truly describing that also) for discharge of said writ should be executed on Monday morning at said Peckham's office as aforesaid; that all the persons then present should attend at said time and place to execute said papers, and that meanwhile said Durant should go free upon his word of honor; that pursuant to said agreement the said Durant and his said sureties and said three counsel met at said office between twelve and one o'clock on said Monday morning, and then and there said bond and said agreement for the discharge of said writ were simultaneously executed in the presence and hearing of all of said six persons.

And this defendant further says that said suit of Isaac P. Hazard and others was diligently prosecuted until the autumn of
27 1870, and was then allowed to subside until about January 1, 1875, R. G. Hazard and Durant having during that period visited Europe, during which interval of rest said Durant, as is alleged, became bankrupt; and further says, upon information and belief, that before said alleged bankruptcy said Griswold had security from said Durant for the indemnity of said sureties or of himself as such surety, but surrendered such security upon Durant's request; that said Griswold has had counsel retained and paid by him in said suit to attend to his interests therein ever since the spring of 1875, and that said Griswold very soon after the making of said bond, though this defendant cannot state the time exactly, admitted that he knew the meaning and effect of said bond, and that it was a bond not of bail, but for payment of money by way of debt or damage if Durant should fail to pay or perform any decree or judg-

ment of the court in said suit, and stated that he was satisfied with Durant's pecuniary condition, but that he had been promised security by him and should exact it.

This defendant denies that any concealment or fraud whatever, as alleged in said bill or otherwise, has been practiced on said Griswold by this defendant or by his consent or with his knowledge, or by any other person, to this defendant's knowledge, information, or belief, and denies also, upon information and belief, that said Griswold signed said bond by mistake, but says and avers, upon information and belief, that said Griswold knew said bond and the whole meaning and effect of it when he signed it, and did not suppose it to be a bail bond, and knew also the said agreement to discharge said writ of *ne exeat* when the same was executed in his presence as aforesaid, and that said Griswold always understood the full scope, intent, and meaning of said bond and agreement.

And this defendant respectfully submits that said bond binds said Griswold to pay any judgment against said Durant in said suit up to $53,735, if said Durant shall fail to pay the same, and to
28 pay damages up to that amount for any violation by said Durant of any decree or decrees in said suit, and that said Griswold has shown no cause for the change, cancellation, or reformation of said bond, and that the same ought not to be reformed or altered, but ought to stand undisturbed, and he claims for himself and all others interested the full security and benefit of said obligation.

And this defendant denies all and all manner of fraud and unlawful combination and confederacy wherewith he is in and by said bill charged, without this, that any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

R. G. HAZARD.

29 *Answer of Rowland Hazard et al.*

The joint and several answer of Rowland Hazard, Elizabeth Hazard, for herself and as trustee, and Anna Hazard, three of the defendants, to the bill of complaint of John N. A. Griswold, complainant.

These defendants, reserving to themselves all right of exception to said bill of complaint, for answer thereto say that they are advised, informed, and believe that the bond mentioned in said bill was lawfully obtained and is a legal and valid obligation; that they admit that suit was commenced by Isaac P. Hazard in August, 1868, as stated in said bill, and aver that in the said suit the said Durant was described as of Newport, in this State, and alleged to be about to depart out of this State and out of the jurisdiction of the supreme

court of Rhode Island; and that they further admit that the defendants in this suit became parties in said suit of Isaac P. Hazard, as stated in said bill, and deny that any defendant in said suit of Isaac P. Hazard has ever sought any unfair advantage over said Durant by arrest or otherwise.

And these defendants further say that in everything in anywise connected with said suit of Isaac P. Hazard they have always been entirely represented by Rowland G. Hazard, one of the defendants in that suit and in this suit; that said Rowland G. Hazard has employed counsel in said first suit, and done and performed every act therein for these defendants by their authority; that, having given said Rowland G. Hazard full authority to act for them in said first suit before and ever since the commencement thereof, and he having thereupon taken and maintained the sole charge of said litigation, these defendants have not otherwise participated therein; that they have read or heard read the answer of Rowland G. Hazard in this suit, and believe the said answer to be true in every respect, and upon such belief they hereby aver all and singular the same to be true, and adopt the same and make the same a part of this answer; that they have no further or other knowledge or information of the matters and things in the complainant's said bill contained, and therefore they leave the plaintiff to make such proof thereof as he may be able to produce, hereby denying the truth of the allegations of said bill save as hereinbefore admitted.

And these defendants respectfully submit that said bond binds said Griswold to pay the judgment against said Durant in said suit of Isaac P. Hazard up to $53,735, if said Durant shall fail to pay the same, and binds him also to pay damages up to said amount for any violation by said Durant of any decree or decrees of court in said suit; and that said Griswold has shown no cause for cancelling, reforming, or altering said bond, and that the same ought to stand undisturbed; and they claim for themselves and all others interested the full security and benefit of said bond.

And these defendants deny all and all manner of fraud and unlawful combination and confederacy wherewith they are by said bill charged, without this, that there is other matter, cause, or thing in said bill contained material or necessary for these defendants to answer, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants; and all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ROWLAND HAZARD.
ELIZABETH HAZARD, *Trustee.*
ELIZABETH HAZARD.
ANNA HAZARD.

31 *Replication.*

The replication of John N. A. Griswold, plaintiff, to the answers of Rowland G. Hazard and others, defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answers contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, are true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

JOHN N. A. GRISWOLD,
Per SAMUEL R. HONEY, *Attorney.*

A. PAYNE.
SAMUEL R. HONEY,
Solicitors for Complainant.

32 *Stipulation A.*

It is stipulated that the evidence of the plaintiff covers the admission that in the suit in R. I. supreme court, Hazard *et al. vs.* Durant *et als.*, the fees of the counsel for T. C. Durant have been guaranteed and part of them have been paid by J. N. A. Griswold, from July, 1875, to the present time.

Also that volumes 11 and 12, R. I. Reports, may be used in evidence of the proceedings in said suit during that period if legally admissible.

SAMUEL R. HONEY,
Complainant's Solicitor.
EDWIN METCALF,
Solicitor for Defendants.

Stipulation B.

In the above-entitled cause it is agreed that the bond, a copy of which (as Exhibit A) is appended to the bill (see page 18 of printed bill), is in the handwriting of Francis B. Peckham, Jr., Esq.; that said Peckham also wrote the endorsement on the said bond; that the same is in his handwriting, except that part of it which relates to the filing of the bond in court, and that said Peckham, at the time he withdrew said bond and wrote the endorsement thereon, was acting as solicitor for the complainants in the suit in the supreme court of Rhode Island entitled Isaac P. Hazard *et als. vs.* T. C. Durant *et als.*

EDWIN METCALF,
Solicitor for Defendants.
SAMUEL R. HONEY,
Solicitor for Complainant.

33 *Complainant's Depositions.*

Deposition of Henry Winthrop Gray, taken April 27, 1882.

Interrogatory 1. What is your name, age, residence, and occupation?

Answer. My name is Henry Winthrop Gray; age, forty-two years; residence in New York; my occupation, broker and member of New York Stock Exchange.

Int. 2. Have you read the bill of complaint in this cause?

Ans. I don't remember that I have read the complaint, but I am familiar with the suit.

Int. 3. Do you know the John N. A. Griswold and Thomas C. Durant who are named therein?

Ans. I do.

Int. 4. What relation, if any, is the former to you?

Ans. He is my uncle—my mother's brother.

Int. 5. Did you request him to become surety for the said Durant on or about August 22, 1868? If yea, state all the conversation relating to such request and all the circumstances which followed.

Ans. I requested him to go bail for said Durant's appearance on August 22, 1868, and I give the conversation and circumstances as follows: Late in the evening a lady friend of Doctor Durant called at my then stopping place in Newport and told me that Doctor Durant had been arrested, and asked me if I would or could help him. I, being a non-resident and without real estate in Rhode Island, knew that my bond would not be accepted. Believing the suit to be malicious and simply for the purpose of annoying Durant by arresting him at near midnight of a Saturday, I found Mr. Griswold at the Ocean House and requested him as a favor to me (Doctor Durant being almost an entire stranger to him) to give bail for his appearance.

34 Int. 6. Where was the said Durant when you took the said Griswold to him?

Ans. In jail in Newport.

Int. 7. State all that occurred there—who was present, what was said and done in the hearing of the said Griswold.

Ans. Durant, S. Dexter Bradford, Griswold, and the sheriff or jailer, some lawyer, I think, and myself. Mr. Griswold was asked to sign the bond that Durant might be released, and he agreed to do so.

Int. 8. On what day of the week was this, and what time of day?

Ans. It was Saturday, between 11.30 p. m. and 1 a. m. Sunday morning.

Int. 9. Do you know the financial condition of the said Durant and of the estate of the said S. Dexter Bradford, deceased; if so, what is it?

Ans. I should say that Bradford's estate is insolvent, and the financial condition of Durant involved.

Int. 10. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue

in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. The whole idea that I had was that a bail bond was to be given to replace him within the jurisdiction of the court when wanted, the same as he was when released from jail on Saturday night.

Cross-examination:

The defendants object to interrogatories 5 and 7, addressed to H. Winthrop Gray, as calling for reports of conversation at which neither of the defendants were present, and to all answers reporting such conversation, as hearsay and immaterial, subject to which objections the defendants file the the following cross-interrogatories:

35 Cross-int. 1. Did you not, some time after the year 1868, file a complaint in the supreme court of the State of New York, which was subsequently removed to the circuit court of the United States, against the defendants in this suit and other parties, at a time when such a complaint might be tried before Judges Barnard and Cardazo or one of them, and in which you charged, among other grounds of complaint, "that the defendants, Rowland G. Hazard, Rowland Hazard, Isaac P. Hazard, Elizabeth Hazard, trustee; Mary P. Hazard, Anna Hazard, Sophia Vernon, and Lydia Torrey, have knowingly and willfully hindered and delayed, and attempted to hinder and delay, the execution and performance of the contract set forth in said complaint" (being the so-called Oakes Ames contract for the construction of the Union Pacific railroad), and charged that said defendants or some of them have instituted proceedings against the said trustees or some of them to detain them and prevent and hinder them from performing their duties as such trustees, and prevented them from attending to their duties in the construction of the said railroad, meaning thereby the suit in the supreme court of Rhode Island by Isaac P. Hazard and others against Thomas C. Durant, and was not the object and prayer of said complaint that said trustees should be enjoined from paying said defendants any of the proceeds, avails, and profits that have accrued or may accrue on said contract?

Ans. I have no recollection of any such suit, nor of filing any complaint inquired about.

Cross-int. 2. Was not the suit which was brought by you removed to the United States circuit court on motion of defendants therein, and did you not, after such removal, at once abandon the prosecution thereof?

Ans. I have no knowledge or recollection of any such thing.

Cross-int. 3. What, if anything, have you ever done since such removal towards the prosecution or trial of said suit?

Ans. No recollection of doing anything.

Cross-int. 4. Did not you, or some one in your presence or to your knowledge, state to the said J. N. A. Griswold, on or about

36 August 22, 1868, that T. C. Durant was a man of very large means, and that he, Griswold, on signing said bond would incur no risk of loss through lack of pecuniary ability on his, Durant's, part, or substantially to that effect?

Ans. I have no recollection of any such conversation; supposed it to be a bail bond. Wealth had nothing to do with it; it was simply a matter of good faith.

Cross-int. 5. State particularly when, where, and by whom such statements were so made to said Griswold.

Ans. I have no knowledge or memory of any such statement being made; cannot answer the question.

Cross-int. 6. Was not S. Dexter Bradford well and intimately acquainted with said Durant on and prior to August 24, 1868? Was he not, to your knowledge, fully satisfied that said Durant was a man of wealth and amply responsible for the amount of said bond; and did not said Bradford, on August 22d, 23d, or 24th, 1868, and before signing said bond, substantially so state to said Griswold or in his presence or hearing?

Ans. I know Bradford was acquainted with Durant, but I think not intimately. I have no recollection of Bradford saying anything about Durant's wealth and being amply responsible, nor have I any means of knowing what Bradford thought on that subject.

Cross-int. 7. Is not said Griswold well known as a capable and successful business man, engaged in large enterprises, and having and deserving a high reputation for intellectual capacity and shrewdness?

Ans. In my opinion, yes.

H. W. GRAY.

Subscribed and sworn to before me this 27th day of April, A. D. 1882.

JOHN A. OSBORN,
U. S. Commissioner, Southern District of New York.

37 *Deposition of Thomas C. Durant, Taken April 29, 1882.*

Interrogatory 1. What is your name, age, residence, and occupation?

Answer. My name is Thomas C. Durant; my age is sixty and upwards; my residence, New York city; my occupation at present is receiver of the Adirondack Company.

Int. 2. Have you read the bill of complaint in this cause?

Ans. I have.

Int. 3. Do you know John N. A. Griswold, mentioned therein?

Ans. I do.

Int. 4. How long have you known him? What has been the extent of your acquaintanceship?

Ans. I have known him since about the spring or summer of 1868. My acquaintance with him has been slight.

Int. 5. Did said Griswold become surety for you on or about August 22, 1868? If yea, state all the circumstances connected there-

with, so far as the same were known to the said Griswold, and all conversations heard by him.

Ans. Mr. Griswold became surety for me on or about the 22d day of August, 1868, and did so at the request of my friend, Henry W. Gray, to release me from jail. He came to the jail with Mr. Gray about eleven and a half o'clock on a Saturday night, and Mr. Griswold told Mr. Hazard's lawyer that if they would release me he would sign a bond for my appearance. It was so late on that Saturday night that there was no time to prepare the bond, and it was arranged that I might be released, and C. C. Van Zandt, Mr. Griswold, and, I think, Mr. Bradford and myself promised to meet Mr. Hazard's lawyers on Monday morning at half past twelve (I mean just after midnight of Sunday night) and have the bond signed.

38 At the appointed hour, early Monday, he signed a bond for my appearance at court, as I understood. The conversation that took place on the Saturday night was general, and the character of the bond was not discussed, to my recollection, but merely spoken of as a bond for my appearance.

Int. 6. Who was your counsel on that occasion?

Ans. C. C. Van Zandt was my counsel on that occasion.

Int. 7. Did said Griswold, to your knowledge, have any counsel?

Ans. He had no counsel.

Int. 8. Where was your home at that time?

Ans. My home at that time was in New York.

Int. 9. How did it happen that you were in Newport? State fully. Had you any other connection with the State of Rhode Island than as you have stated?

Ans. I went to Newport to meet my yacht, "Idler." I went there as a matter of pleasure, and had no business there whatever, except as a visitor; no connection whatever with the State of Rhode Island.

Int. 10. State the circumstances connected with your arrest at that time; what day of the week was it and on what time of day.

Ans. I was arrested on Saturday night, between ten and eleven o'clock, just as I landed from my yacht with a party of friends, including some ladies, who had been out sailing in my yacht. A couple of men, who afterwards turned out to be officers of the law disguised by linen dusters, approached me and spoke to me aside, stating that they had a warrant for my arrest and I must go to jail. I accompanied them to the jail, and some of my pleasure party sent for Mr. Gray, who came with Mr. Griswold.

Int. 11. Do you remember the said Griswold signing the bond mentioned in said bill?

Ans. I do.

Int. 12. Give the names of all persons present at the time, and state all that was said and done in the hearing of the said Griswold.

39 Ans. There were Mr. Bradley, Mr. Peckham, I believe Mr. Sheffield, Mr. Van Zandt, Mr. Bradford, Mr. Griswold, and myself. The conversation was general, more particularly about the arrest, and that I was to sign a bond for my appearance at court. The bond was already prepared and in the hands of Hazard's at-

torneys. I asked my lawyer, Mr. Van Zandt, if the document was all right, and he said yes; whereupon I signed it and Mr. Griswold signed it. The whole time was but a few minutes. I cannot recall any special conversation that took place.

Int. 13. Was the said Griswold in any way indebted to you or under any obligation to you at the time?

Ans. He was not indebted to me, nor was he under any obligations, and I know of no reason for his signing the bond except as a personal favor to Mr. Gray.

Int. 14. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. I can only say that on several occasions after my release he (Griswold) spoke in conversation that he had signed the bond for my appearance at court when called upon, and to be ready to place myself within its jurisdiction, and I supposed myself that that was the extent of the bond.

THOS. C. DURANT.

The defendants object to all interrogatories addressed to Thomas C. Durant calling for the reports of conversations in which neither of the defendants took part or at which either of the defendants was present in person or by counsel, such conversations, in the absence of all the defendants, being merely hearsay and immaterial.

The defendants, on the same ground, object to interrogatories 8, 9, 12, and 13, addressed to said Durant; subject to which objections the defendants file the following cross-interrogatories to the said Durant:

40 Cross-examination:

Cross-int. 1. At what house in Newport did you spend the night of August 21, 1868? Who then owned said house or occupied it as lessee or tenant? At what hour did you leave said house on the morning following—that is, on August 22, 1868?

Ans. I don't recollect whether I was on the yacht "Idler" or at the house of George F. Train, in Newport. Mr. Train and his family then occupied the house. It was owned by Col. George T. M. Davis, trustee for his daughter, Mrs. Train, and her heirs, as I have been informed by Col. Davis and his daughter, Mrs. Train. If I stayed at the house I must have left about 10 a. m., in order to be prepared to receive my guests on board the yacht.

Cross-int. 2. How long before and after August, 1868, had you a residence or temporary stopping place in Newport? In what house or houses? When and with whom did you reside and stay in Newport between 1865 and 1870?

Ans. I never had any residence in Newport at any time prior to August, 1868. For several yachting seasons I was in the habit of visiting Newport for several days at a time, sometimes staying on board my yacht and sometimes at the house of Mr. Train. By

"several yachting seasons" I mean to cover the time between 1865 and 1870. On one occasion, subsequent to the arrest, I was in Newport two or three weeks, attending to the suit in question.

Cross-int. 3. Was not your house or residence for a considerable period of each year from 1865 to 1870 in the family of George Francis Train, and in the house in Newport occupied by them? Did you not so reside in said house portions of several of the six years aforesaid? State which of them.

Ans. No farther than stated in my answer to the second cross-interrogatory.

Cross-int. 4. Was not that house the place where, for some time before and after August 22, 1868, your friends and persons seeking you on business called for and found you, and to which your letters were addressed and where you were accustomed to receive them?

41 Ans. No. All letters prior to August, 1868, were received by me at the post office in Newport. I transacted no business at the house of Mr. Train, and did not entertain my friends there. I always entertained my friends on my yacht. Subsequent to August 22, 1868, while I was detained at Newport in regard to the suit, as I have before stated, I received some papers, and my attorney, and perhaps one or two more, called on me at Mr. Train's house in relation to the suit in question.

Cross-int. 5. Did you generally pay rent or board during the time you spent in Newport between 1865 and 1870? Please examine your books and rent and board bills and state from them in detail what time in each of said years you were in Newport. If you paid rent, did any person except yourself and servants occupy the premises so rented by you? If so, give the name of each person who occupied any portion of said premises other than you or your servants.

Ans. I never paid any rent or board except when I stopped over night at a hotel. My books only show what time the yacht was in commission and her expenses each season, and not the days I was in Newport. The yacht was there sometimes when I was not aboard and when I was elsewhere than Newport. I never occupied any premises in Newport during the time inquired about, with servants or with my family.

Cross-int. 6. Was the arrest inquired of in interrogatory 10 resisted by you or any one attending on you or in your employ or then in company with you? Was the sheriff subjected to insult and violence?

Ans. No. My arrest being made by two men not then known to be officers, and not declaring themselves to be by any shield or other badge, one of my servants or men in my employ interfered until I could explain to him what was meant by the arrest, and after quieting him there was no other interference, and the persons seeking my arrest (if one was the sheriff) was not subjected to insult and violence further than I have stated.

42 Cross-int. 7. Did not said arrest take place on the wharf in Newport, immediately after your landing?

Ans. It did.

THOMAS C. DURANT.

Subscribed and sworn to before me this 29th day of April, A. D. 1882.

JOHN A. OSBORN,
United States Commissioner, Deputy Clerk of United States District Court.

Deposition of John N. A. Griswold.

JOHN N. A. GRISWOLD, being duly sworn, deposeth and saith:

Int. 1. What is your name, age, residence, and occupation?

Ans. My name is John N. A. Griswold; age, fifty-nine years; occupation, out of business at present; residence, New York city.

Int. 2. Of what city, county, and State are you a citizen?

Ans. New York city, New York county, New York State.

Int. 3. Do you know the respondents? Of what State are they residents?

Ans. I do. They are residents of Rhode Island.

Int. 4. Have you read the bill of complaint in this cause?

Ans. I have.

Int. 5. Do you know the Thomas C. Durant who is named therein? State how long you have known him and the extent of your acquaintance with him; state fully.

Ans. I do know him. I first met him in the spring of 1868; was introduced to him by my nephew, H. W. Gray; my acquaintance with him was very slight until after I went his bail, in August, 1868.

43 Int. 6. Had you any acquaintance with the said Durant prior to August 22, 1868?

Ans. Only as stated above.

Int. 7. Had you any interest in the Credit Mobilier of America at that time and have you had any since?

Ans. None whatever, at any time.

Int. 8. What was the place of your residence at that time?

Ans. Newport, Rhode Island.

Int. 9. Did you, on or about that time, become surety for the said Durant in any form? If you answer yes, please state all the circumstances connected with your so becoming surety. At whose request? Give the conversation, if any, which you had with him at that time. On what day of the week was it and at what time of day? Give the names of all persons present at the time.

Ans. I did. On Saturday night, August 22, 1868, I was at a ball at the Ocean House, Newport, with my family, and about eleven o'clock my nephew, H. W. Gray, drove up in a carriage, called me out, and begged me to go down to the jail and bail out his friend Durant, who had been arrested that night on the wharf when landing from his yacht with a party of friends. He stated that Rowland G. Hazard was personally hostile to Durant, and had thus arrested him late Saturday night in order to lock him up in jail over Sun-

day. Deeming it an outrageous breach of the hospitalities of the place, and to gratify my nephew, I went down to the jail and there found Durant. Shortly afterwards Mr. Peckham, Hazard's counsel, and, I think, Mr. Bradley, appeared. It being then at half past eleven, and too late to draw a bond which would be legal, I told them if they would release Durant I would meet them at Mr. Peckham's office on Monday morning early and sign a bond for his appearance when wanted. I had no conversation with Durant other than that I would sign a bond for his appearance. All the persons present that I recollect were Durant, Gray, Peckham, I think Bradley and Sheffield, and the sheriff.

44 Int. 10. Did you then sign any bond? If yes, what kind of a bond did you suppose it to be?

Ans. I did not sign any bond on this Saturday night, but on Monday morning, about 12.30 a. m., I went to Mr. Peckham's office and signed what I supposed was a bail bond for Durant's appearance when wanted.

Int. 11. What were your reasons for being willing to become surety?

Ans. My reasons were to gratify my nephew, H. W. Gray, and because I thought it was a hardship that a visitor in Newport should be thus arrested and detained from his business and family. I did not understand, nor did any one explain to me, that the bond I was to sign was anything but a bond for Durant's appearance when wanted. Had it been stated that the bond contained any obligation on my part to pay any sum of money, except on Durant's failure to appear and place himself in the same position he then was when I released him from jail, I should have declined to sign it.

Int. 12. Did you believe that the said bond was a bond conditioned for the payment by you of a sum of money in case the said Durant did not pay it?

Ans. I did not believe it, and would not have signed any such bond.

Int. 13. At the time you executed the said bond did you know or had you heard of the agreement mentioned on page 7 of the printed bill in this cause?

Ans. I had not.

Int. 14. When did you first know or hear of said agreement?

Ans. About a year ago.

Int. 15. Had you any counsel at the time you signed said bond? Did you have legal advice of any kind in relation thereto?

Ans. I had no counsel nor any legal advice.

Int. 16. When did you first have reason to suppose that any other construction was put upon the said bond than the one you had supposed to be correct? State all the circumstances. When did you first hear of the term "*ne exeat?*"

45 Ans. After Durant became bankrupt and was in contempt of court—some time subsequent to 1873—I learned that Hazard was pressing this suit with a view of making me responsible for the payment of any decree of the court. This was the first intimation I had that any such construction could be put upon the bond.

I don't know that I ever heard of the term "*ne exeat.*" If I did I supposed that and the bail bond were one and the same thing.

Int. 17. Do you know the financial condition of the said Thomas C. Durant and of the estate of S. Dexter Bradford, deceased? If so, state it.

Ans. I think they are both bankrupt.

Int. 18. Give your reasons for being willing to become bail for the said Durant on the occasion referred to.

Ans. I have already answered this interrogatory in answer to the eleventh interrogatory.

Int. 19. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. I can think of nothing except that Hazard allowed this suit, to drag along for years and years until Durant became irresponsible. I think prior to 1873 Hazard's lawyer (Bradley) stated to me that the suit had been compromised and settled, and I was astonished to find that it was reopened.

Int. 20. Did you know or hear of the rule of court discharging the writ of "*ne exeat*" on August 24, 1868? (See printed bill, pages 9 and 10.) When did you first hear of said rule?

Ans. I did not at that time. I never heard of the rule until within a year.

J. N. A. GRISWOLD.

SAMUEL R. HONEY,
Solicitor for Complainant.

46 The defendants object to all interrogatories addressed to the said complainant calling for the recital of conversations, and to all answers purporting to give conversations in which neither of the defendants took part or at which neither of the defendants was present in person or by counsel, such conversations in the absence of all the defendants being merely hearsay and immaterial.

The defendants, on the same ground, object to last clause of interrogatory 10, addressed to said complainant, and to interrogatories 11, 12, 16, 18, and 20, also addressed to him; subject to which objections the defendants file the following cross-interrogatories to the said John N. A. Griswold:

Cross-examination:

Cross-interrogatory 1. Did you not confer with Charles C. Van Zandt, counsel for said Durant, before or at or about the time of your signing said bond? Did you not then ask said counsel and did he not then tell you the nature thereof and the liability it created or imposed?

Answer. I did not confer with Charles C. Van Zandt, nor did I ask nor did he tell me the liability the bond created or imposed.

Cross-int. —. Did you not read said bond or the condition thereof, or hear it read? When and where was it so read? By whom, if

any one, was it read to you? Give the names of all persons present at such reading.

Ans. It was not read to me by anybody. I read it and noticed the terms "abide by and perform the decrees of the court." In the absence of any explanation, I inferred that it meant that Durant should appear and render himself subject to the processes of the court. Had the bond read, pay any decree of the court, I should have understood it differently and refused to sign it. At the time I read the bond Peckham, Bradley, Durant, Gray, Sheffield, and Bradford were present.

Cross-int. 3. Have you conferred with said Durant's counsel respecting the defence to said suit of I. P. Hazard *et als. vs.* T. C. Durant *et als.*, or any steps or proceedings therein; if so,
47 with whom, when, and in relation to what matter arising in said suit or what steps or proceedings therein?

Ans. Since Durant got in contempt I have conferred with him about the suit and with my counsel as to how I should be able to arrest Durant and bring him to Rhode Island in case he should decline to come. I also conferred once with Durant's counsel as to the nature of the bond, and he assured me that it was nothing more than a "*ne exeat*" or bail bond.

Cross-int. 4. Have you not retained counsel and assisted in conducting the defense or some point or points and some stage of said suit of Hazard *vs.* Durant? State fully what you have done or authorized in such defense and what counsel acted for you therein and where and in what courts or tribunals.

Ans. Since Durant got into contempt and had no money to pay counsel I told Messrs. Honey & Payne that if they would look out for my interest in the suit I would pay their fees.

Cross-int. 5. Was not security promised, offered, or suggested to you, either before or after you signed said bond, to indemnify you against loss by you as surety thereon? State fully when, by whom, and all the circumstances.

Ans. None was ever offered or suggested or asked for.

Cross-int. 6. Has not such security been actually given to you by said Durant or by some one in his behalf? If not, has any, and what, reason been given to you why such security was not furnished?

Ans. None has been given by Durant or by anybody else, nor any reason given, as there has been no occasion for it.

Cross-int. 7. Has not said Durant, or some one in his behalf, since August 22, 1868, placed in your hands or under your control shares in the capital stock of the Union Pacific Railroad Company, or a certificate or certificates of such shares, to indemnify you against loss as surety on said bond? Answer fully and give names, dates, and amounts in detail.

48 Ans. They have not for that purpose. In October, 1870, I loaned Durant $80,000 for sixty days on 4,400 shares of Union Pacific stock, then worth about $20 a share. At the maturity of the loan Durant was embarrassed—could not pay; the stock had declined to $18 a share. He asked to have the loan renewed

for six months without offering any additional security. This I declined to do, but agreed I would carry the stock for six months, if necessary, release him from all liability on the loan, and give him half the profits over the $80,000 and interest. In May, 1871, I delivered him 2,000 shares of this stock, then worth $70,000, at the market price, receiving from him $43,000, thus leaving him a clear balance of $27,000 in his favor. Had I then supposed that I was pecuniarily liable on the bond, knowing as I did that he was embarrassed, I should have held on to this security. That was the only opportunity I ever had to secure myself. This transaction had no connection with the bond.

Cross-int. 8. Have not other stocks, property, or securities been transferred to you or placed in your hands or control to indemnify and protect you as such surety? Give amounts, dates, and names of parties to such transaction or transactions.

Ans. No.

Cross-int. 9. Have you not stated that security was in your hands at one time since August 22, 1868, as a protection and indemnity to you as aforesaid, or so that you might have thereby protected yourself? Did you not at some time since that date have in your hands or under your control for that purpose stocks or other property or securities? State fully.

Ans. In addition to what I state in my answer to the 7th cross-interrogatory, I have never stated that I had security for this bond. I have stated, however, that had I known that an attempt was to be made to hold me responsible on the bond I should have held on to the securities which I turned over to Durant in 1871, as before stated in my answer to cross-interrogatory seven.

J. N. A. GRISWOLD.

E. METCALF,
Solicitor for Defendants.

49 *Deposition of Charles C. Van Zandt.*

Interrogatory 1. What is your name, age, residence, and occupation?

Answer. Charles C. Van Zandt; fifty-one years; Newport, R. I.; and occupation, a lawyer.

Int. 2. Have you at different times been a member of the Legislature, and Governor of the State of Rhode Island?

Ans. I have; and was Governor three terms.

Int. 3. Have you read the bill of complaint in this case?

Ans. I have.

Int. 4. Were you present at the taking of the bond mentioned in said bill of complaint?

Ans. I was.

Int. 5. In what capacity were you present?

Ans. As counsel for Thomas C. Durant.

Int. 6. State what was said and done in the presence of J. N. A. Griswold in relation to said bond, and state who were present.

(Objected to by Mr. Metcalf as to any statement as to what was

said or done not in the presence of one or more defendants in this suit.)

Ans. On Saturday night preceding the giving of the bond I was called from my bed between eleven and twelve o'clock, as I recollect, by Mr. Samuel Dexter Bradford, and requested to go to the county jail to act as counsel for Mr. Thomas C. Durant, who had just been taken into custody. I went forthwith and met Mr. Durant for the first time. Mr. John N. A. Griswold and Samuel Dexter Bradford were present, ex-Judge Charles S. Bradley, and, I believe, Mr. Francis B. Peckham, Jr. There were others present, whom I do not definitely recollect. I do not positively remember whether or not Mr. Rowland G. Hazard was present; my impression is that he was. Sheriff Lake was present. I was shown a writ of *ne exeat*, upon which Thomas C. Durant was then held in custody. It was
50 agreed, since it was about midnight of Saturday night, that Thomas C. Durant should be allowed to depart the jail, he, John N. A. Griswold, and Samuel Dexter Bradford verbally agreeing that Durant would personally appear on Monday morning and give a bond, as I understood it, to appear and answer to the writ. The conversation was brief, as the hour was late, and my recollection is that Durant agreed to appear at the office of Francis B. Peckham, Jr., Esq., on Monday morning, at nine o'clock. Between ten and eleven o'clock of the succeeding Sunday night some one came to my residence—I do not remember who—and requested me to produce Mr. Durant at Mr. Peckham's office, so that the bond might be given immediately after twelve o'clock—that is, the first thing Monday morning. I drove to the residence of Mr. George Francis Train, where Mr. Durant was visiting, called him from his bed, and accompanied him to Mr. Peckham's office. Mr. John N. A. Griswold and Mr. Samuel Dexter Bradford, Judge Bradley, Francis B. Peckham, Jr., and others were present. I do not recall the names of the others. A bond, prepared by Messrs. Peckham and Bradley, was handed to me as counsel for Mr. Durant; there was some little discussion as to whether it should be made to the sheriff of Newport county or to the complainants in the then suit. Judge Bradley preferred the latter, and it was so done. I told Mr. Durant that, in my opinion, it was a proper bond to secure his appearance in the suit, and the bond was then executed.

Int. 7. In what capacity were Judge Bradley and Mr. Peckham present?

Ans. As counsel of record for the complainants in the pending suit, in which the writ of *ne exeat* was issued.

Int. 8. State whether anything was said in your presence or, to your knowledge, in the presence of Mr. Griswold, by Judge Bradley or Mr. Peckham or any other person, as to the construction or effect of said bond; if so, state what was said.

(Objected to as before, and because calling for the verbal construction of the written instrument.)

51 Ans. I heard nothing said by Judge Bradley or Mr. Peck-

ham except what I have already stated. I myself told Mr. Durant that, in my opinion, the instrument was in effect a bail bond.

Int. 9. So far as you know, did J. N. A. Griswold have knowledge of the agreement on page 7th of the printed bill, or of the order discharging the writ of *ne exeat*, mentioned on pages 9th and 10th of said printed bill?

Ans. Not to my knowledge.

Int. 10. Were you at that time or at any time acting as the counsel of J. N. A. Griswold in the matter of that bond?

Ans. I was not and never was.

Int. 11. Was Mr. Griswold present when you told Durant that, in your opinion, it was in effect a bail bond?

Ans. He was present, but I do not know whether he heard the conversation.

Int. 12. Was other counsel afterwards associated with you in the conduct of that case; and, if so, who?

Ans. There was. The week following, by instruction from Durant and several of the other parties defendant to the suit, I retained Hon. Thomas A. Jenckes as my associate counsel.

Int. 13. Are you now counsel for Mr. Durant?

Ans. I am not. I retired as counsel for him when I assumed the office of Governor of the State, and have not since resumed the relation. This was about five years ago.

Int. 14. During the time in which you acted as counsel for Mr. Durant in this case did you hear from the parties or from counsel in the case of any construction of the bond referred to different from that which you had given Mr. Durant?

(Objected to by defendants as last before.)

Ans. I did not until some years after, when Durant was adjudged in contempt of court and failed to purge himself. I then heard it indirectly, not from counsel or one of the parties.

52 Int. 15. Prior to the execution of this bond had you been connected with any case, as counsel, in which *ne exeat* proceedings had been had?

Ans. I never had, and, as nearly as I could ascertain, there had never been more than one or two cases in the State of this character.

Int. 16. To your knowledge, had J. N. A. Griswold any counsel, or did he advise with any counsel as to the execution of this bond?

Ans. Not to my knowledge.

CHARLES C. VAN ZANDT.

53 DEFENDANTS' DEPOSITIONS.

Deposition of Francis B. Peckham, Jr.

Interrogatory 1. Did you, as counsel for complainants in the suit in equity, Isaac Hazard and others *vs.* Thomas C. Durant and others, instituted in the supreme court of Rhode Island in August, 1868, have any knowledge of the bond which is the subject-matter of the

present suit? If so, state fully what was said and done at the execution of said bond and preparatory thereto.

(Complainant objects to the witness stating anything which was said or done not in the presence of John N. A. Griswold, the complainant in this case.)

Answer. I was one of the complainant's counsel in the case; Judge Bradley was the other. We applied for a writ of *ne exeat* in Newport on the 22d of August, 1868, about noon. The writ was issued about one o'clock and handed to Deputy Sheriff Lake at that hour, with instructions. He might have been the sheriff, but I think he was deputy sheriff. About three o'clock he returned and went down to the wharves. I mean he returned to the court-house, and from there went down to the wharves of the harbor. Continuous watch was kept up there by him or some assistant of his until late in the evening. Then a yacht came into the harbor from up the bay, and Durant, with three or four ladies, was rowed ashore from the yacht to Commercial wharf. He was arrested then and there at about eleven o'clock. He rode off in the carriage with Mr. Lake, the officer. I followed on foot to the sheriff's office. I found there only some person in charge of the office. After a little talk with him I went away for Judge Bradley. I found him and started with him for the jail. On the way to the jail I stopped for a few minutes. Judge Bradley went on without me. When I got to
54 the jail I found there Judge Bradley, who had only preceded me there by a minute or two; Mr. Durant, Charles C. Van Zandt, his counsel; Mr. Griswold, Dexter Bradford, and a stranger, who was, I presume, Mr. Gray. Mr. Van Zandt and Judge Bradley were already talking about the release of Mr. Durant from custody. Judge Bradley said, "That is a simple matter. Let him give the bond called for by the writ." The nature of that bond was briefly explained. Mr. Durant said that it was out of the question for him to give it; that he couldn't remain any longer in Rhode Island; that his presence was absolutely demanded outside of the State and forthwith, and that he must leave here Monday morning. It was suggested that he might file his answer and apply for the discharge of the writ immediately, but he said, "I know what proceedings in court are, and I can't remain here at all." It was then proposed that he should give a bond in the same amount marked in the two writs in the two cases, conditioned to abide and perform whatever decrees the court might make against him in those suits. The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to pay money in case Durant should not perform any decree made by the court was commented on by Mr. Van Zandt and Mr. Durant. During all this interview Judge Bradley did all the talking for the complainants, and Mr. Van Zandt and Mr. Durant spoke about equally for their side. No one else said anything, that I remember, with one exception. The sureties were near enough to hear all that was said, and couldn't help hearing if they paid any attention, but they

took no part in the discussion. Mr. Gray—if it was Mr. Gray—did speak pretty warmly about the arrest, and said that the suits were blackmailing suits set on foot by Rowland G. Hazard. He used some strong language about Mr. Hazard, and while the form of this bond which is now in suit was being debated he broke in and said that there never would be any decree against Mr. Durant; that Durant would never have anything to pay; that the complainants
55 would have to pay Durant damages for malicious prosecution, and that that was all the paying there would be about it. Mr. Durant assented to that and signified his approval of that way of stating the case. Mr. Van Zandt having conferred with Mr. Durant, and those two having conferred with the sureties—I mean Mr. Griswold and Mr. Bradford—Mr. Van Zandt then announced that they would give the bonds proposed. As it was then very late, it was further agreed that all should meet at my office on the following Monday morning, soon after midnight, and execute the papers. Besides these bonds, it was also agreed that the respective counsel should sign an agreement that upon the bonds being executed the writs of *ne exeat* should be absolutely discharged. Just at the close of the interview Judge Bradley addressed himself to all present, saying that he wished to make sure that all understood the arrangement alike, and he stated that Mr. Durant was to give bonds, with Mr. Griswold and Mr. Bradford as sureties, in the sums marked in the writs, to abide and perform all the decrees of the court in the suit; that counsel should sign agreements for the discharge of the writs; that all should meet at my office soon after midnight Monday morning and sign the papers; that in the meantime Mr. Durant would go free from custody upon his word of honor, and he appealed to the sureties, saying, "We rely upon you, gentlemen, to see that he attends." We then separated. I prepared the papers and had them lying upon my table when we met, pursuant to the arrangement. They were read. Mr. Griswold took an active part at this meeting and, I think, read the papers for himself. The papers were signed without any objection or discussion at that time. Probably we were not together at my office more than ten minutes.

Int. 2. Was it stated or claimed by any person in your presence or to your knowledge, at or prior to the execution of said bond, that it was a bond for the appearance of said Durant only?

Ans. No, sir.

56 Int. 3. Did you subsequently have any conversation with said Griswold, in which said bond or bonds were spoken of? If so, state when, where, and what was said on that subject.

Ans. About the last of October or the first of November, 1868, along that time, I met Mr. Griswold on Thames street, in Newport, near my office. He spoke of this bond as if it were a bail bond. I said, "No; it is a bond upon which you may be liable to pay money. If, for example, the court should find a judgment against Durant for any sum of money and he did not pay it, you could be held for the amount named in these bonds." He said, "Well, I guess you are right, but I must see Durant about it. He must do something about it." I asked him, "Why, he is rich enough, isn't he?" and Mr.

Griswold said, "Yes; he is rich enough, but he is reckless, and there is no telling how long such a man may stay rich, and he must give me security." I would like to add here that I mentioned this to Mr. Honey last winter. Mr. Honey said that he was confident, from conversations he had had with his client, Mr. Griswold, that Mr. Griswold had no recollection of any such conversation with me, and I replied that if Mr. Griswold did not recollect it I should hesitate about swearing to it, and that I did not think I would swear to it under those circumstances, and that certainly I would not like to do so. Still I have felt bound to state it here, upon further reflection, with these explanations.

Int. 4. At any subsequent stage in said Hazard-Durant case was said bond alluded to or the nature of the obligation created thereby stated before said supreme court or any other, and what court? State fully when, what, in substance, was said, claimed, or admitted, and by whom or in whose behalf.

(Complainant objects to any statement not made in the presence of Mr. Griswold or by him or by any person not authorized to represent him.)

Ans. In November, 1868, defendants' application to remove the Hazard-Durant cases was heard by the supreme court in
57 Providence. The complainants objected to the removal on several grounds. One was that Durant was estopped from removing the causes because he had given these bonds. We argued that as these bonds were not bail bonds nor other security which would be saved and made to follow the suits by the statute of removal, that he ought not to be allowed by removing to deprive the complainants of their security. The same objection was argued in the United States circuit court in the following summer. In their answer to this objection the defendant's counsel, Messrs. Thomas A. Jenckes and C. C. Van Zandt, did not claim that the bonds were bail bonds. In September, 1870, Durant was before the court under arrest for contempt for having received stock in suit No. 2, which he had been enjoined from receiving. He refused to return the stock, and the court ordered that he should not be discharged without giving the complainants security to take the place of their interest in said stock. Defendant's counsel, Messrs. Jenckes, Dixon and Van Zandt, insisted that as he had already given security in the cause for over $50,000—in other words, the bond which is the subject of this suit—that the court on that account ought to reduce the amount of the bond then proposed. The court finally fixed the amount of that last bond at $95,000 by an order prescribing the condition of the bond in the same language as is used in the bond which is the subject of this suit. This bond last mentioned was never executed, and Mr. Griswold was not present, to my knowledge, at either of these several hearings before said courts.

Int. 5. When, if ever, and from whom did you first learn that it was claimed or pretended that said bond was only a bond for the appearance of said Durant, or that it was intended to be only a bond for his appearance?

Ans. Well, I think some time in 1879 or 1880; not very long before Mr. Griswold petitioned the supreme court to give up and cancel the bond upon his surrendering Durant. Very soon after I knew that Mr. Honey was counsel for Mr. Griswold in the Durant cases. I should think as early as 1876 or 1877 he spoke to me about
58 this bond and said that in his opinion the bond itself in its terms was only a bail bond. He did not say that it was so intended by any one, but he said that that was the legal effect, although something different might have been intended.

(Complainant objects to so much of the answer as relates to the opinion of Mr. Honey or anything said by him, it not appearing that he was authorized to represent Mr. Griswold in the subject-matter of this suit at that time.)

Cross-examination:

Cross-int. 1. How much time was occupied by the interview, which occurred on Saturday evening, at the jail, to which you referred?

Ans. I should think about half an hour. I should think rather less than more.

Cross-int. 2. Are you positive that Mr. Griswold was present and within hearing during the whole of that interview?

Ans. Yes, sir. I feel very sure of it. I have no doubt of it.

FRANCIS B. PECKHAM, JR.

Deposition of Charles S. Bradley.

Interrogatory 1. Did you, as counsel for complainants in the suit in equity, Isaac P. Hazard and others *vs.* Thomas C. Durant and others, instituted in the supreme court of Rhode Island in August, 1868, have any knowledge of the bond which is the subject-matter of the present suit? If so, state fully what was said and done at the execution of said bond and preparatory thereto.

(Complainant objects to the witness stating anything which was said or done not in the presence of John N. A. Griswold, the complainant in the case.)

Answer. I was one of the counsel with Mr. Peckham for the
59 complainants in the Hazard-Durant suit. I was present at the time the arrangement was made for the giving of the bonds, and also when they were executed. I cannot recollect all the incidents of the transaction as vividly as does Mr. Peckham, whose deposition I have just heard. I remember the substance of the transaction. The persons present at the jail when it occurred were, on the part of the complainant, Mr. Peckham and myself; on the part of the defendant, Mr. Van Zandt, his counsel; Mr. Durant, Mr. Griswold, and some other persons whom I do not distinctly remember. Considerable complaint was made by the friends of Mr. Durant, who were there, in regard to the proceeding, and that Mr. Hazard was in the wrong and would in time be prosecuted therefor. This was rather put aside, and, as Mr. Durant said that it was indispensable that he should leave the State on the following Monday,

the question was, what he could do to discharge the writ, and it was proposed that he give a bond in the same amount as stated in the writ, with sureties, for which Mr. Griswold and another person who was present were thought to be sufficient, for the performance of any decree which should be made; that it was to be a security. It was, according to the best of my recollection, understood by all parties, and that papers should be drawn containing the terms and provisions of such a bond, and agreement, also to be reduced to writing, for the discharge of the order of the court directing the issuing of the writ of *ne exeat*. It was the eve of Sunday, about 12 o'clock at night. The proper papers could not be drawn so as to be executed before 12 o'clock. The midnight of Sunday night was proposed for their execution, so that Mr. Durant could leave early Monday morning. There was nothing said during that interview, to the best of my recollection and belief, by any one conveying the idea that the complainants were to obtain from the defendant nothing but bail for his appearance. The mode of giving bail uniformly practiced in this State, so far as I know, is to endorse the name of the bail in the writ. In this case the terms of the bond were expressed, so as to exclude the idea that it was merely a bail for appearance, and to provide that it should be a bond to abide and perform the order of the court. It was not the desire of any party that Mr. Durant should remain in custody over Sunday; and, as there was not time for the execution of the papers on Saturday, it was agreed that Mr. Durant should go, and that his return to execute the papers rested only on the honor of himself and that of his friends who appeared there for him. As the transaction was a peculiar one, and as some considerable feeling was expressed by Mr. Durant and his friends, and as it was to be left to a verbal agreement, it was thought proper at the close to state clearly what had been agreed upon in the hearing of all parties concerned, and it was then so stated by myself that a bond, signed by Mr. Durant and by the two sureties, who were there and were named by him, in the amount named in the writ, to abide by and perform all the decrees which should be made by the court, should be drawn and executed, and that at the same time an agreement in writing should be signed by counsel for both sides for the discharge of the writ, and that the parties should meet at midnight of the following night, at the office of Mr. Peckham, for the examination and execution of such papers. The parties—that is, Mr. Durant, his two sureties, Mr. Van Zandt and Mr. Peckham and myself—met at Mr. Peckham's office at the time appointed, and, after a brief examination, the papers were executed without objection. While I cannot recall all the language or incidents of the interview, or much of it, the impression on my mind that the transaction was to operate as a security to the complainants to the extent of the sum named in the bond for their claim upon Durant, which should be established by judgment, is clear and strong.

Int. 2. Was it stated or claimed by any person, in your presence or to your knowledge, at or prior to the execution of said bonds, that it was a bond for the appearance of said Durant only?

Ans. It was not.

Int. 3. What acquaintance, if any, have you had with John N. A. Griswold, the complainant in this suit? Have you acted for
61 him as counsel in any matter? Has the subject-matter of the Hazard-Durant case been the subject of conversation between him and yourself; if so when? Did you state to him that said Hazard-Durant suit had been settled, or to that effect? State any conversation you had with him in relation to said suit.

Ans. I do not remember ever to have met Mr. Griswold before the occasion referred to in the first answer. In the following year, I think it was 1869, I was employed with Mr. Sheffield by him as his counsel in a controversy as to his right to use the wharf at Rocky Point as a landing for a steamboat belonging to him; also in a bill in equity brought against him by Marshall Woods, of Providence, in regard to some land or shore rights adjacent to Rocky Point, so called. I do not recall any other professional matters. I have occasionlly met him in the streets and elsewhere, and once or twice in Parker's, in Boston, and in School street, near Parker's. In some of those interviews he did make inquiry as to the progress of the Hazard-Durant suit. I never told him that the suit was settled, or words to that effect. Such was not the fact, nor had I any such idea in my mind. The fact was that in the fall of 1870 a partial agreement for the reference of that suit and sundry other matters to Judge Curtis as referee was made. The agreement was completed so far that Mr. Durant surrendered all claims, if any he had, upon the complainants in the Hazard suit for having brought those actions or for any proceedings therein. The other portions of the completed agreement related to the liability of other parties than Mr. Durant. Mr. Durant at one time claimed that a completed settlement had been made. His counsel, however, gave up the claim, and neither of the complainants, the Hazards, or their counsel ever considered or claimed that that case was settled. I may have told Mr. Griswold, in answer to inquiries from him, that proposals and a partial agreement for a reference in the case had been made. I could never have told him the case was settled. I never intended that he should so understand. My conversation with him is, of course, very in-
62 distinct in my memory. I can only say that in these conversations that I understood and supposed that he understood that he was liable to a certain extent for the results of that litigation.

Int. 4. At any subsequent stage in said Hazard-Durant case, was said bond alluded to or the nature of the obligation created thereby stated before said supreme court or any other, and what, court? State fully when, what in substance was said, claimed, or admitted, and by whom or in whose behalf.

(Complainant objects to any statement not made in the presence of Mr. Griswold or by him or by any person not authorized to represent him.)

Ans. In answer to this question I am enabled to refresh my memory, and therefore to state specifically what has occurred on some occasions. Not long after this suit was brought the defendant named, after having made a similar application in the State court, —

to the circuit court of the United States for the removal of said suits from the State courts to said circuit court. The complainant filed a printed brief and printed points of argument, so called, upon the hearing of that motion. I have a copy of that paper before me. One ground then taken was that Durant was estopped from making the application for the removal by the bond and the discharge of the order for *ne exeat*, and under that head it is said, among other things, "that surety to the amount of $75,000 is good and effectual as long as the suit remains in the State court, but will become worthless on removal, for its condition is to abide and perform the orders and decrees of the supreme court of the State of Rhode Island, and none other. It is a special and peculiar bond, not preserved for the plaintiffs after removal by any provision of this act, for the saving clause here relates only to bail, attachments, and injunctions, and to injunction bonds given by the plaintiff—*vide* act of July 27, 1866;" and, further, "the motion is granted upon the defendants giving security to abide the decrees of the court, and that security remains such throughout the whole case, and until performance of the final decree." Some cases cited in which
63 giving security for demand and abiding the decree are spoken of as synonymous, and in the points of the argument it is said, among other things, "especially should they be when a bond imparting a consideration with security to the amount of $70,000 for the performance of the decree of the State courts would be rendered null by the removal." These extracts show that the bond in question was deemed by the complainant's counsel in that case to be a security for the performance of the decrees in that case. No differing view of the nature of that bond, according to the best of my recollection and belief, or that it was a bail bond merely, was taken by the counsel then engaged for the defendant, who were Mr. Van Zandt and Mr. Jenckes. Subsequently, in the fall of 1870, there was occasion to refer to the bond in question, as the defendant's counsel, who were the same as before, with the addition of Mr. Dixon, in moving to have their client discharged for contempt of court for converting certain property to his own use in violation of their injunction, offered to give a bond to take the place of the property, and upon the question as to the amount of the bond brought to the attention of the court the fact that the complainant already had a bond as security to them in a large sum of money. A decree was entered by the court upon that application, which was examined by the counsel upon both sides, but which is in the handwriting of Mr. Peckham, providing that a bond should be given in the sum of $95,000, conditioned that the said Thomas C. Durant should abide by and perform the orders and decrees of said court in said case. According to the best of my recollection and belief, there was no difference of opinion among the counsel upon both sides as to what was the effect and meaning of the first bond. At a later stage, in 1876, in a brief filed in the cause by Messrs. S. R. Honey, C. C. Van Zandt, and A. Payne, solicitors for the defendants in said cause, I find a clause giving a history of the proceedings in this case, in which, among other things, they say as follows: "And on August

28, 1868, the writ of *ne exeat* was discharged, a bond in the
64 nature of a bail bond being substituted therefor by consent of counsel," and on page 4, "the proper bond to have been substituted for the writ of *ne exeat* was a bond conditioned that the defendant would not leave the State without the leave of the court first obtained, but in lieu thereof a bond was substituted conditioned to abide by and perform all the orders of the supreme court of Rhode Island.

"This irregularity in the substitution of the bonds was the ground assigned by the court for rejecting the petition for removal, upon the principle that the defendant was estopped by his own act from making the petition." This statement in the last paragraph, as to the ground of the decision, is a mistake, as the motion was decided upon its merits and not upon the estoppel. This statement is found in what is termed a record history of the case, and the facts referred to in those quotations were not a subject of discussion at that hearing. These are all the instances that I remember in which this bond has been referred to in proceedings in the cause, excepting the petition filed by Mr. Griswold in 1880, asking that the bond be construed as a bail bond. As to the parties by whom or from whom these representations were made, I know of nothing except what appears upon the record, except upon a motion made in 1878, in the name of Durant, before the supreme court, in regard to the use of affidavits before the master, Mr. Durant, according to my recollection, did not appear; Mr. Griswold did. Messrs. Payne and, I think, Mr. Honey also conducted that motion in behalf of the applicant, and Mr. Griswold conducted himself as a party interested in the proceeding.

Int. 5. When, if ever, and from whom did you first learn that it was claimed or pretended that said bond was only a bond for the appearance of said Durant or that it was intended to be only a bond for his appearance?

Ans. At or about the time of the filing of the motion for the construction of the bond was the first, to my recollection, that any one claimed that the language of the bond had that effect, and in the fall of 1881, after the filing of the present bill, I for the first
65 time heard that it was claimed by any one that it was intended that this bond should have that effect by the parties when they made it, or either of them; that I learned from Mr. Metcalf, who informed me that a bill of that tenor had been filed.

No cross-examination.

CHARLES S. BRADLEY.

Deposition of Henry Winthrop Gray.

Interrogatory 1. Are you the same Mr. Gray who has heretofore testified in this cause?

Ans. Yes, sir.

Int. 2. Have you read the depositions of Francis B. Peckham, Jr., and Charles S. Bradley, given in this cause?

Ans. I have read all of the depositions of Mr. Peckham and all of

Mr. Bradley's, as far as I could be familiar with the circumstances referred to. The closing portion, referring to proceedings in court, I did not read.

Int. 3. I call your attention to that part of Mr. Peckham's deposition which was as follows: "It was then proposed that he should give a bond in the same amount marked in the two suits—in the two cases—conditioned to abide and perform whatever decrees the court might make against him in those suits. The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to pay money in case Durant should not perform any decree made by the court was commented on by Mr. Van Zandt and Mr. Durant," and I ask you whether such conversation as is here described occurred in John N. A. Griswold's presence.

Ans. No, sir.

Int. 4. I now call your attention to that portion of Mr. Peckham's deposition in which, speaking of you, he says as follows: "And while the form of this bond which is in suit was being debated he broke in and said that there never would be any decree against Mr. Durant," and I ask you whether the form of the bonds was debated in your presence.

Ans. No, sir.

Int. 5. I now call your attention to that part of Mr. Peckham's deposition in which he testifies as follows: "Besides these bonds, it was also agreed that the respective counsel should sign an agreement that upon the bonds being executed the writs of *ne exeat* should be absolutely discharged," and I ask you whether any conversation relating to such alleged agreement took place in presence of John N. A. Griswold.

Ans. My memory is that on an agreement—a verbal agreement, I think it was—at all events, it was an agreement—that a bond should be signed as soon as Sunday was passed, Mr. Durant was released.

Int. 6. I now call your attention to that part of Mr. Peckham's deposition in which he testifies as follows: "Just at the close of the interview Judge Bradley addressed himself to all present, saying that he wished to make sure that all understood the arrangement alike, and he stated that Mr. Durant was to give bonds, with Mr. Griswold and Mr. Bradford as sureties, in the sums marked in the writs, to abide and perform all the decrees of the court in the suits; that counsel should sign agreements for the discharge of the writs; that all should meet at my office soon after midnight Monday morning and sign the papers; that in the meantime Mr. Durant would go free from custody upon his word of honor; and he appealed to the sureties, saying 'We rely upon you, gentlemen, to see that he attends,'" and I ask you whether such remarks were made by said Bradley in presence of John N. A. Griswold?

Ans. I believe such remarks were made, with the exception of the words "to abide and perform all the decrees of the court in the suits." What I intend to answer by that is that these gentlemen

pledged themselves to produce Dr. Durant when called for by the court.

67 Int. 7. Is it correct, as stated by Charles S. Bradley, that John N. A. Griswold agreed to be surety for the performance by Durant of any decree which should be made, or that said bond should be security for something more than the appearance of said Durant?

Ans. No, sir.

It is agreed that the complainant's right to cross-examine this witness is reserved.—D. B., examiner.

H. W. GRAY.

Deposition of Rowland G. Hazard.

Interrogatory 1. Were you present at Newport county jail, August 22, 1868, while Thomas C. Durant was there in custody, or at the office of F. B. Peckham, Jr., August 24, 1868, when the bond in question in this suit was executed?

Answer. I was not.

Int. 2. Were you present at any hearing in the case — Isaac P. Hazard and others *vs.* Thomas C. Durant and others, in the supreme court of Rhode Island, or in the circuit court of the United States for the district of Rhode Island, when said bond was alluded to? What, if anything, was said at such hearings in regard to the nature or character of said bond? State when and by whom or in whose behalf said bond was spoken of.

(Objected to on the ground that it is, first, immaterial; and, second, improper, unless the statements alluded to were made in the presence of Mr. Griswold.)

Ans. I was present when argument in the circuit court of the United States for the district of Rhode Island on the application of the defendants in that case for the removal of the case from the State to the United States courts, in which the counsel for the complainants, Messrs. Charles S. Bradley and F. B. Peckham, urged that the complainants had a bond, conditioned for the performance of or to abide all the orders and decrees of the State court, to the

68 amount of over fifty thousand dollars, and that if the defendants were allowed to remove the case to the United States court the complainants would lose their security to that amount, and this statement was not denied or questioned, I believe, by the counsel on the other side. I was present at a hearing before the supreme court of Rhode Island, in which the counsel for defendants, who on that occasion, I believe, were the Hon. Charles C. Van Zandt and Hon. Thomas A. Jenckes and Hon. Nathan F. Dixon (the subject under discussion being the amount of the bond to be given for the violation of an injunction by Durant), and the said counsel for the defendants then argued that the bond to be given should be made less for the reason that the complainants already had security by a bond for over fifty thousand dollars, and this was not questioned by the counsel for the complainants. The bond alluded to

in the case above mentioned was the bond which is the subject of this suit.

Int. 3. When and how or from whom did you first learn that it was claimed or pretended that said bond was only a bond for the appearance of said Durant?

Ans. I don't recollect the particular date, but it was not long before some proceeding was instituted in the supreme court to have said bond reformed or declared to be a bond of some particular character—I don't now exactly recollect what the proceeding was. The counsel for the complainants, F. B. Peckham, Esq., in the suit of Hazard and others *vs.* Durant and others, told me that he heard some proceedings would be commenced claiming that it was only a bond for the appearance of Durant. That was the first intimation that I ever had that the bond was not for the payment of so much money by the bondsman in case of a recovery against Durant and of his failure to pay.

Int. 4. What instructions or authority, if any, did you or any complainant in said cause of Hazard *vs.* Durant, to your knowledge, give to your counsel relating to the release of said Durant from arrest and imprisonment on August 22, 1868?

69 (Objected to on the ground that intercourse or any instructions passing between Hazard or other complainants and their counsel cannot in any way affect the respondents to that suit, and still less Griswold, who was a stranger to that suit; and, further, because such instructions cannot in any case affect third parties unless such third parties agree to such instructions.)

Ans. There was no one but myself and the counsel for the complainants attending to the matter on behalf of the complainants after the arrest of Durant on that day. I learned a little before eleven o'clock p. m. that Durant had just been arrested as he landed from his yacht, and that owing to the lateness of the hour the sheriff had taken him directly to the jail instead of to his own office, as had previously been arranged. I immediately went to C. S. Bradley's lodgings and had him called from his bed to go and see what could be done to prevent Durant from remaining in jail over Sunday. We walked together from near the Atlantic House, I think, to Mr. Sheffield's office. On the way I authorized Judge Bradley, if necessary, to use my name for the purpose of releasing said Durant from jail until Monday morning, it being regarded as very doubtful whether Durant in the short time then remaining before Sunday would be able to provide the necessary bonds.

Cross-examination:

Int. 5. At these hearings of which you have spoken in your replies to direct question No. 2 was Griswold present or represented?

Ans. I did not then know Mr. Griswold by sight, and do not know that he was present or represented.

Int. 6. Did you, either before or after the signing of the bond by Durant, Bradford, and Griswold, have any personal communication with either of them as to said bond?

Ans. I don't recollect that I had any communication with them whatever at any time.

Int. 7. Did you ever, previous to the proceedings spoken of
70 in your answer to direct question 3, have any personal communication with any counsel of Griswold relative to said bond?

Ans. I have no recollection of ever having had any such communication, and believe I never had.

Int. 8. Did you ever have any personal communication in relation to this bond with any counsel of Bradford or Durant prior to the proceedings alluded to in your answer to direct question 3?

Ans. I don't recollect that I ever had, and believe that I had not.

Int. 9. What did you mean in your last direct answer by saying that you authorized Bradley to use your name for the purpose of releasing Durant from jail until Monday morning?

Ans. I don't know that I can express it more clearly than I did there. The object was to allow him more time to get the bond required. What the precise mode of doing that was I didn't pretend to know, not being familiar with such things; but I was willing to assume some risk for that time rather than that he should be kept in jail over Sunday.

Int. 10. Did you mean to authorize Bradley to discharge him from arrest?

Ans. I don't think I had any idea as to the specific mode in which it was to be done.

Int. 11. Did you mean to authorize Bradley to discharge him from arrest?

Ans. I meant to leave the whole matter in the hands of Bradley and Peckham with the suggestion, as above stated, that they might do what they thought best.

Int. 12. Then your words to Bradley were an abandonment of the whole matter to the discretion of Bradley and Peckham?

Ans. I believe I have stated all the important facts. Whether they warrant such broad inference as an "abandonment of the whole matter" seems to me a question which it is not place to decide.

Int. 13. Then your words to Bradley were an abandon-
71 ment of the whole matter to the discretion of Bradley and Peckham?

Ans. I don't see that I know anything to be added to my previous answer.

R. G. HAZARD.

72 COMPLAINANT'S DEPOSITIONS.

Deposition of Charles C. Van Zandt in Rebuttal.

CHARLES C. VAN ZANDT, being duly sworn, deposes and says as follows:

Interrogatory 1. Your attention is called to that part of the testimony of Francis B. Peckham herein in which (speaking of the occurrences at the jail in Newport just after Dr. Durant was arrested)

he testifies as follows: "Mr. Van Zandt and Judge Bradley were already talking about the release of Mr. Durant from custody. Judge Bradley said, 'That is a simple matter; let them give the bond called for by the writ.' The nature of that bond was briefly explained. Mr. Durant said that it was out of the question for him to give it; that he couldn't remain any longer in Rhode Island; that his presence was absolutely demanded outside of the State, and forthwith. It was suggested that he might file his answer and apply for the discharge of the writ immediately; but he said, 'I know what proceedings in court are, and I can't remain here at all.' It was then proposed that he should give a bond in the same amount marked in the two writs—in the two cases—conditioned to abide and perform whatever decrees the court might make against him in those suits. The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to pay money in case Durant should not perform any decree made by the court was commented on by Mr. Van Zandt and
73 Mr. Durant," and I ask you whether this is true or not. If you say that it is not all true, state what part is untrue.

Answer. We did not arrive at the jail until nearly midnight on Saturday. Dr. Durant said that he would not give bonds not to depart the State, as he must be in New York to attend to his business. I do not remember that it was suggested that he might file his answer to the bill and apply for the discharge of the writ on his reply, as stated by Mr. Peckham. It was proposed by Judge Bradley that Dr. Durant should give bond, with two sureties, which should be substituted for the writ and the writ withdrawn. I then understood from the conversation that the bond was in the nature of a bail bond, and that when the sureties delivered Dr. Durant into the custody of the court, to either perform its orders and decrees personally or to suffer such penalties personally as the court might impose, they would comply with the conditions of the bond. Nothing was said in my presence by any person inconsistent with these views.

Int. 2. Was the form of the bond debated in the jail between Judge Bradley, on the one hand, and you and Mr. Griswold, on the other, as stated by Mr. Peckham in his testimony?

Ans. I have no recollection that anything was said about the form of the bond, farther than I have already stated.

Int. 3. Did you confer with Dr. Durant and Mr. Griswold and Mr. Bradford as to the form of the bond, as stated by Mr. Peckham in his testimony, and did you state that Dr. Durant and the sureties would give the bond in question?

Ans. I did confer with Dr. Durant about giving the bond, as we understood it. I have no recollection of conferring with either Mr. Griswold or Mr. Bradford. I do not remember that I stated that Dr. Durant and his sureties would give a bond, but it was so understood before we left the jail.

Int. 4. Your attention is now called to the part of Mr. Peckham's testimony, still speaking of the interview at the jail, in which

74 he states as follows: "Just at the close of the interview Judge Bradley addressed himself to all present, saying that he wished to make sure that all understood the arrangement alike, and he stated that Mr. Durant was to give bonds, with Mr. Griswold and Mr. Bradford as sureties, in the sums marked in the writs, to abide and perform all the decrees of the court in the suits; that counsel should sign agreements for the discharge of the writs," and I ask you whether any such remarks were made by Judge Bradley.

Ans. I have no recollection that Judge Bradley made the remarks indicated by Mr. Peckham. I have already stated what he said.

Int. 5. How long was Mr. Griswold present at the jail?

Ans. As I recollect, only a portion of the time during the interview.

Int. 6. I call your attention to that part of Judge Bradley's testimony herein in which he states as follows, in speaking of the interview at the jail: "The question was what he could do to discharge the writ, and it was proposed that he give a bond in the same amount as stated in the writ, with sureties, for which Mr. Griswold and another person who was present were thought to be sufficient, for the performance of any decree which should be made—that it was to be a security," and I ask you if any such question arose at that interview.

Ans. There was nothing said or intimated by any person in my presence or hearing on that occasion to indicate that the bond was a security instead of a surety.

Int. 7. What has become of Mr. Thomas C. Durant?

Ans. I am informed and believe that he is dead.

CHARLES C. VAN ZANDT.

The defendants assent to the taking of Gov. Van Zandt's deposition in answer to above seven interrogatories, reserving right to cross-examine after seeing the deposition.

E. METCALF,
Solicitor for Defendants.

75 Then personally appeared before me the above-named Charles C. Van Zandt and made oath to the truth of the foregoing deposition by him signed, and I certify that the deposition was taken not in presence of counsel.

EDWIN S. BURDICK,
Notary Public.

Deposition of John N. A. Griswold in Rebuttal.

JOHN N. A. GRISWOLD, being duly sworn, deposes and answers as follows:

Interrogatory 1. Your attention is called to that part of the testimony of Francis B. Peckham herein in which (speaking of the occurrences at the jail in Newport just after Dr. Durant was arrested) he testifies as follows: "Mr. Van Zandt and Judge Bradley were

already talking about the release of Mr. Durant from custody. Judge Bradley said, 'That is a simple matter. Let him give the bond called for by the writ.' The nature of the bond was briefly explained. Mr. Durant said that it was out of the question for him to give it; that he couldn't remain any longer in Rhode Island; that his presence was absolutely demanded outside of the State, and forthwith, and that he must leave here Monday morning. It was suggested that he might file his answer and apply for the discharge of the writ immediately, but he said, 'I know what proceedings in court are, and I can't remain here at all.' It was then proposed that he should give a bond in the same amount marked in the two writs in the two cases, conditioned to abide and perform whatever decree the court might make against him in those suits. The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to
76 pay money in case Durant should not perform any decree made by the court was commented on by Mr. Van Zandt and Mr. Durant;" and I ask you whether this is true or not. If you say that it is not all true, state what part is untrue.

Answer. I was at the jail only a few minutes, not over fifteen, I think, and I am sure no such discussion as to the nature of the bond as stated by Mr. Peckham took place while I was there. Not a word was said in my presence to lead me to believe it was anything more than an ordinary bail bond.

Int. 2. Did Mr. Van Zandt confer with you and Mr. Durant and Mr. Bradford as to the form of the bond, as stated by Mr. Peckham in his testimony, and did Mr. Van Zandt state that you and the other surety, with Mr. Durant, would give the bond in question?

Ans. Mr. Van Zandt did not confer with me or explain it in any way.

Int. 3. Your attention is now called to the part of Mr. Peckham's testimony in which, still speaking of the interview at the jail, he states as follows: "Just at the close of the interview Judge Bradley addressed himself to all present, saying that he wished to make sure that all understood the arrangement alike, and he stated that Mr. Durant was to give bonds, with Mr. Griswold and Mr. Bradford as sureties, in the sums marked in the writs, to abide and perform all the decrees of the court in the suits; that counsel should sign agreements for the discharge of the writs;" and I ask you whether any such remarks were made by Judge Bradley.

Ans. I am sure Judge Bradley made no such remarks in my presence.

Int. 4. How long were you present at the jail?

Ans. Not over fifteen to twenty minutes, I think.

Int. 5. I call your attention to that part of Judge Bradley's testimony herein in which he states as follows in speaking of the interview at the jail: "The question was what he could do to discharge the writ, and it was proposed that he give a bond in the same amount as stated in the writ, with sureties, for which Mr.
77 Griswold and another person who was present were thought

to be sufficient, for the performance of any decree which should be made; that it was to be a security;" and I ask you if any such question arose at that interview.

Ans. No.

Int. 6. Your attention is now called to Mr. Peckham's evidence, in which he testifies as follows: "About the last of October or the first of November, 1868—along that time—I met Mr. Griswold on Thames street, in Newport, near my office. He spoke of the bond as if it were a bail bond. I said, 'No; it is a bond upon which you may be liable to pay money. If, for example, the court should find a judgment against Durant and he did not pay it you could be held for the amount named in these bonds.' He said, 'Well, I guess you are right, but I must see Durant about it; he must do something about it.' I asked him, 'Why, he is rich enough, isn't he?' and Mr. Griswold said, 'Yes; he is rich enough, but he is reckless, and there is no telling how long such a man may stay rich, and he must give me security,'" and I ask you whether such an interview ever took place?

Ans. I have no distinct recollection of the interview referred to. I do remember having stated my belief that it was a bail bond, as stated by Mr. Peckham, but on that or no other occasion have I ever admitted that it was other than a bail bond.

J. N. A. GRISWOLD.

Agreed that Mr. Griswold's deposition in answer to above interrogatories may be taken by any magistrate (not in presence of counsel), reserving the right of the defendants to cross-examine after seeing the deposition.

October 3, 1885.

EDWIN METCALF,
Defendants' Solicitor.

78 Then personally appeared before me the above-named John N. A. Griswold and made oath to the truth of the foregoing deposition by him signed, and I certify that the deposition was taken not in presence of counsel.

EDWIN S. BURDICK,
Notary Public.

79 Heard by Colt and Carpenter, JJ.

No. 1087. No. 1087.

Opinion of the Court. Filed Jan'y 14th, 1886.

CARPENTER, *J.*:

This is a bill to cancel or, in the alternative, to reform a bond given by Thomas C. Durant, as principal, and John N. A. Griswold and S. Dexter Bradford, as sureties, to the respondents.

It appears that at the September term, 1868, of the supreme court of Rhode Island for the county of Newport, Isaac P. Hazard brought his bill of complaint against Durant and others and The

Credit Mobilier of America, in which he alleged that Durant was largely indebted to the Credit Mobilier, and that the corporation had refused to demand the sums due from him, and prayed that Durant be decreed to account with the Credit Mobilier, and to pay over the sums due to that corporation. Rowland G. Hazard was a respondent in that bill, and he and the other respondents in this bill appear to have been interested therein by reason of the fact that they were stockholders in the Credit Mobilier.

On motion, a writ of *ne exeat* was issued on that bill, by virtue of which Durant was arrested on the evening of Saturday, the
80 22d day of August, 1868. A discussion then ensued as to the form of bond which might be given as the condition of the release of Durant from arrest, in consequence of which discussion Durant was released on his oral promise to appear at an early hour on Monday morning, the 24th of August, and execute the required bond. On the day appointed he appeared with his sureties and executed a bond which is the subject of this suit, and which is a bond in the sum of $53,735, conditioned "that said Thomas C. Durant shall on his part abide and perform the orders and decrees of the supreme court of the State of Rhode Island in the suit in equity of Isaac P. Hazard and others against said Thomas C. Durant and others, now pending in said court, within and for the county of Newport."

The evidence shows, without doubt and without contradiction, that this bond was drawn by counsel for Isaac P. Hazard and was presented to the complainant and was signed by him as and for the bond which, on the Saturday evening before, he had agreed to sign. The complainant alleges, first, that the bond which was proposed on Saturday and which he agreed to sign was a bail bond, or a bond in the nature of a bail bond, which would bind him in the penalty only on condition that he failed to produce the body of Durant to answer to such decree as the court should make, and that,
81 when the counsel for Hazard on Monday morning presented to him for his signature the bond in question, without explaining to him that it was in effect different from a bail bond, such presentation amounted to a fraud from which he should be relieved by the cancellation of the instrument so presented and signed by him.

In the second place, he alleges that at the conversation on Saturday the bond which was then agreed to be signed was agreed and understood by both parties thereto to be a bail bond, and that the subsequent execution of a bond of a different character was a mutual mistake of fact, from which he should be relieved by reforming the instrument, so as to make it conform with the contract actually made between the parties.

We do not think the evidence supports either of these allegations. At the conversation on Saturday evening, at which the bond was agreed to be given, there were present Mr. Bradley and Mr. Peckham, who were counsel for Isaac P. Hazard, and also Thomas C. Durant, John N. A. Griswold, S. Dexter Bradford, Henry W. Gray, who was a friend of Durant; William D. Lake, the sheriff of the

county, and Mr. Van Zandt, who was counsel for Durant. Mr. Peckham and Mr. Bradley both testify in distinct terms that the
82 nature of the bond to be given was fully discussed; that Durant said that he could not give the bond required by the writ, which was a bond not to depart out of the jurisdiction without leave of the court, and also stated that it was impracticable for him to apply to the court to discharge the writ on giving bond, as usual in such cases, giving the reason for both statements that his business required him to leave Newport on Monday following, and that they, on behalf of the complainants, then offered to discharge the writ of *ne exeat* by an agreement to be filed in court, provided Durant and his sureties would undertake to execute a bond conditioned that Durant should abide and perform the decrees of the court.

Mr. PECKHAM testifies:

The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principals and sureties liable to pay money in case Durant should not perform any decree made by the court was commented on by Mr. Van Zandt and Mr. Durant. During all this interview Judge Bradley did all the talking for the complainants and Mr. Van Zant and Mr. Durant spoke about equally for their side. No one else said anything that I remember,
83 with one exception. The sureties were near enough to hear all that was said, and couldn't help hearing, if they had paid any attention, but they took no part in the discussion.

GRAY testifies:

When first called, "Mr. Griswold was asked to sign the bond that Durant might be released, and he agreed to do so. * * * The whole idea that I had was that a bail bond was to be given to replace him within the jurisdiction of the court when wanted, the same as he was when released from jail on Saturday night." On being recalled in rebuttal he explicitly denies that there was such conversation as is detailed by Mr. Peckham. Durant testifies that Griswold "signed a bond for my appearance in court, as I understood. * * * The character of the bond was not discussed, to my recollection, but merely spoken of as a bond for my appearance. * * * I supposed myself that that was the extent of the bond."

GRISWOLD testifies:

"I told them if they would release Durant I would meet them at Mr. Peckham's office on Monday morning early and sign a bond for his appearance when wanted. * * * I went to Mr. Peckham's office and signed what I supposed was a bail bond for Durant's appearance when wanted. * * * I did not under-
84 stand nor did any one explain to me that the bond I was to sign was anything but a bond for Durant's appearance when wanted." He also explicitly denies the conversation as detailed by Mr. Peckham.

Mr. Van Zandt testifies that it was agreed "that Durant would

personally appear on Monday morning and give a bond, as I understood it, to appear and answer to the writ;" that on Monday "a bond prepared by Messrs. Peckham and Bradley was handed to me as counsel for Mr. Durant. * * * I told Mr. Durant that in my opinion it was a proper bond to secure his appearance in the suit, and the bond was then executed. * * * I myself told Mr. Durant that in my opinion the instrument was in effect a bail bond." He also contradicts the testimony of Mr. Peckham and Mr. Bradley.

This is substantially all the testimony bearing directly on the question as to what was said at the conversation on Saturday night.

We cannot find on this testimony that there was either fraud or mutual mistake. Where fraud is charged it must be clearly proved, and the same rule, with equal reason, as it seems to us, has been held to apply to an allegation of mutual mistake. (Hearne *v.* Marine Insurance Co., 20 Wall., 488.) In this case the witnesses for the respondents were placed in a position where it was their duty
85 clearly to understand the nature of the security they were to accept, and to see that it was clearly understood by all parties, so that no dispute might arise when the bond came to be executed.

They say explicitly that they did so understand, and that they did fully explain the nature of the bond to all who were present, and they detail the substance of the conversation at length, and, in the case of Mr. Peckham, with careful particularity. If their testimony be true, then there was no fraud, and there was equally no mistake, unless the complainant made a mistake in relying, as his bill says he did, on his own judgment in signing the bond.

We are not prepared to say that their testimony is not true. We think it more likely that the memory of the other witnesses is unreliable.

The bill will therefore be dismissed with costs.

86 *Final Decree. Entered Jan'y 21st*, 1886.

This cause came on to be heard upon the bill, answer, and proofs, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the court that the said complainant's bill of complaint be, and hereby is, dismissed, and that the said defendants recover and have of the said complainants their costs of defence, to be taxed by the clerk.

Entered as the decree of this court, per order thereof, this 21st day of January, A. D. 1886.

HENRY PITMAN, *Clerk.*

June term, 1886, to wit:

OCTOBER 30TH, 1886.

Complainant's counsel came into court and claimed an appeal in open court to the Supreme Court of the United States at its next session; bond to be filed within thirty days.

HENRY PITMAN, *Clerk.*

87 *Claim of Appeal. Filed Nov'r 11th, 1886.*

No. 1087.

The complainant in the above case, believing himself aggrieved by the final decree entered therein January 21st, A. D. 1886, from which decree he, at the succeeding term of said court, on October 30th, 1886, prayed an appeal in open court, now prays that his appeal be allowed, and that a transcript of the record, pleadings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court, and that a citation on said appeal may issue to the respondents.

By his solicitor, ARNOLD GREENE.

Bond on Appeal. Filed Nov'r 11th, 1886.

Know all men by these presents that we, John N. A. Griswold, of the city of New York and State of New York, as principal, and Samuel R. Honey, of the city of Newport, in the State of
88 Rhode Island, and Edwin S. Burdick, of the city of Newport, in the State of Rhode Island, as sureties, are held and firmly bound unto Rowland G. Hazard and Rowland Hazard, both of South Kingston, in the State of Rhode Island; Elizabeth Hazard and Elizabeth Hazard, trustee, and Anna Hazard and Lydia Torry, all of Newport, in the State of Rhode Island, in the sum of five hundred dollars, to be paid to the said Rowland G. and Rowland, Elizabeth and Elizabeth, trustee, and Anna and Lydia, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this eighth day of November, anno Domini eighteen hundred and eighty-six.

Whereas, at a circuit court of the United States holden at Providence, within and for the district of Rhode Island, by adjournment, on the 21st day of January, A. D. 1886, in a bill in equity depending in said court, wherein the said John N. A. Griswold was complainant and the said Rowland G. Hazard, Rowland Hazard,
89 Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torry were respondents, which bill in equity was docketed in said circuit court as No. 1089, a decree was rendered against the said John N. A. Griswold dismissing his said bill of complaint, and the said John N. A. Griswold has appealed in open court from said decree to the Supreme Court of the United States, to be holden at Washington on the second Monday of October next after the date hereof:

Now the condition of the above obligation is such that if said John N. A. Griswold shall prosecute said appeal with effect and answer all

costs if he fail to make his plea good, the above obligation shall be void; otherwise shall remain in full force.

J. N. A. GRISWOLD. [L. S.]
SAM'L R. HONEY. [L. S.]
EDWIN S. BURBANK. [L. S.]

Signed & sealed in presence of—
CHARLES H. KOHNE, JR.

Approved:
LE BARON B. COLT,
Circuit Judge.

90 STATE OF RHODE ISLAND, } *ss:*
Newport, }

We, Samuel R. Honey and Edwin S. Burbank, who are mentioned in the foregoing obligation as sureties thereon, being severally duly sworn, on oath depose and say that we are severally possessed of estate and property of the value of fifteen hundred dollars over and above the liabilities of each of us.

SAM'L R. HONEY.
EDWIN S. BURBANK.

Sworn and subscribed to this tenth day of November, 1886.
WALTER B. SIMMONS,
Notary Public.

91 RHODE ISLAND DISTRICT, *ss:*

Seal of Circuit Court, Rhode Island. The President of the United States of America to the marshal of said district or to his deputy, Greeting:

You are hereby required to make known to Rowland G. Hazard and Rowland Hazard, both of South Kingston, in the State of Rhode Island; Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torry, who reside in Newport, in the State of Rhode Island, that in a certain cause in equity in the circuit court of the United States within and for the district of Rhode Island, wherein they were defendants and John N. A. Griswold, of the city, county, and State of New York, was plaintiff, the said plaintiff has appealed from a decree of the said court rendered against him in said cause at the November term, 1885, thereof, holden at Providence, within and for said district, on the 15th day of November, A. D. 1885, to wit, January 21st, A. D. 1886, unto the Supreme Court of the United States next to be holden at Washington, in the District of Columbia, on the second Monday of October, A. D. 1887, which appeal has been duly allowed, and that they, the said Rowland G. Hazard, Rowland Hazard, Elizabeth Hazard, Anna Hazard, and Lydia Torry, then and there be before said Supreme Court to hear the proceedings
92 on the said appeal, if it shall seem expedient unto them, and further to do and receive what in the said Supreme Court

shall be adjudged and decreed in this behalf; and make due return of this citation with your doings thereon.

In witness whereof I have caused the seal of the said circuit court to be hereunto affixed and have subscribed these presents this 12th day of November, A. D. 1886.

LE BARON B. COLT,
Circuit Judge.

RHODE ISLAND DISTRICT, *sc.:*

PROVIDENCE, *Nov.* 17, 1886.

I have this day served this citation on Edwin Metcalf, Esq., by personally delivering into his hands and possession a true and attested copy of the same, he, the said Metcalf, being the attorney of record of the respondents within named, to wit, Rowland G. Hazard and Rowland Hazard, of South Kingston; Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torry, of Newport, all of the State of Rhode Island.

JAMES H. COGGESHALL,
U. S. Marshal.

Service	$2 00
Copy	50
	$2 50

P'd J. H. Coggeshall, U. S. M.

93 UNITED STATES OF AMERICA, }
District of Rhode Island, } *ss.:*

CLERK'S OFFICE, U. S. CIRCUIT COURT,
AT PROVIDENCE, *February 10th*, 1887.

I, Henry Pitman, clerk of said court for said district, hereby certify that the foregoing ninety-two pages contain a true transcript of the record of the cause in equity, John N. A. Griswold *vs.* Rowland G. Hazard *et als.*, and of all of the proceedings therein.

Seal of Circuit Court, Rhode Island.

In testimony whereof I have hereunto set the seal of said court and my hand on the day and year above written.

HENRY PITMAN, *Clerk.*

Endorsed on cover: Rhode Island C. C. U. S. No. 626. John N. A. Griswold, appellant, *vs.* Rowland G. Hazard, Rowland Hazard, Elizabeth Hazard, Elizabeth Hazard, trustee; Anna Hazard, and Lydia Torry. Filed June 22, 1887.

Office Supreme Court U. S.
FILED.
MAR 31 1891
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 340.

JOHN N. A. GRISWOLD,
Appellant,

vs.

ROWLAND G. HAZARD et al.,
Appellees.

BRIEF FOR APPELLANT.

JAMES C. CARTER,
Of Counsel.

ALBERT B. KING, Printer, 89 William St., N. Y.

Supreme Court of the United States.

JOHN N. A. GRISWOLD,
Appellant,

against

ROWLAND G. HAZARD *et al.*,
Respondents.

STATEMENT.

This bill was filed by the appellant, John N. A. Griswold, in the Circuit Court of the United States for the District of Rhode Island, to procure the cancellation, or, failing that, the reformation, of a bond given by one Thomas A. Durant with the appellant and another, as sureties in order to procure the release of Durant from the custody of the Sheriff on a writ of *ne exeat*, issued in August, 1868, by the Supreme Court of Rhode Island, in a suit in equity in which Isaac P. Hazard and others, suing for themselves, and all the other stockholders of the corporation known as the Credit Mobilier of America were the complainants, and the said Durant and others were the defendants; and for an injunction against the prosecution of the bond.

The suit in the Supreme Court of Rhode Island

was based upon allegations that the corporation above mentioned had divers claims against Durant, growing out of alleged malversations and misappropriations of money belonging to the corporation for which it had refused to bring suit; and the right of Hazard to bring the suit was based upon this alleged refusal—he being a stockholder in the corporation.

That action was, indeed, a somewhat extraordinary one. Of all the parties to it the complainant alone was a citizen of Rhode Island. The corporation itself was of Pennsylvania. Process could not be served in Rhode Island against the corporation, nor against any of the natural persons who were defendants, unless they might casually be found in that State; and the proper trial in that jurisdiction of questions growing out of the internal management of a foreign corporation seems hardly practicable, unless with the voluntary assistance of the corporation itself and its officers, which, upon the allegations of the bill, could scarcely be obtained. Durant happened to be then making the harbor of Newport his haven on a yachting excursion (p. 33.) Upon this feeble ground he was described in the bill as "of Newport" (p. 22), and a writ of *ne exeat* was prayed for and obtained, upon the ground that he was about to depart from the State!

Whether the Supreme Court of Rhode Island had any jurisdiction to entertain such a controversy is a question raised in another suit between the present parties; and, if it had such jurisdiction, the question whether it ought, in the exercise of a just discretion, to have afforded its aid to such an attempt, may be one for that Court alone to determine; but the character of the suit and the motives which prompted it are, never-

theless, not altogether immaterial in the present controversy. The whole transaction which resulted in giving the bond from which relief was sought by the bill in this cause is properly to be taken into view. No considerations, either of justice or convenience, are apparent upon which the attempt to bring this controversy before the Supreme Court of Rhode Island can be justified. There seems to be no room for any other conjecture than that the motive was to harass the defendant Durant by tying him to the State of Rhode Island when his business required him to be elsewhere, and thus to exact from him some payment or concessions.

On the 22d of August, 1863, which happened to be Saturday, Durant was arrested upon the *ne exeat* in Newport late at night, on his landing from his yacht. He seems to have had no friends in that place who could become bail for him, and it was necessary to make application to strangers. The complainant Griswold was applied to by a Mr. H. W. Gray, who was his relative, and a friend of Durant, and asked to become bail. Mr. Griswold had a very slight acquaintance with Durant, but, as he says, thinking that the arrest was an outrage upon the hospitalities of the place, and not supposing that he was to incur any other obligation than that of ordinary bail, he consented and went to the jail for the purpose. A Mr. S. Dexter Bradford, who afterwards, and before the trial, died insolvent, was also persuaded to go for the same purpose.

The conversation and circumstances which took place at the jail on this Saturday, late at night, are the principal matters of fact upon which there was conflict of testimony. According to the testimony of the complainant's witnesses (four in number), it being too late at night for a bond to be then drawn,

there was simply an agreement made that Durant should be released upon his promise and that of the sureties that they would be present at the office of the complainant's attorneys on the following Monday morning and execute a bond *for the future appearance* of Durant. The defendants' witnesses (two in number) testified that the agreement upon which Durant was released was that he and his sureties should, on the morning above mentioned, execute a bond *to perform any decree* which might be *rendered in the cause*.

Without anticipating the discussion of the question of the weight of evidence it is needful here only to say that the parties appeared soon after midnight on Monday morning at the place appointed, when the bond, on account of which relief was sought in this action, was produced and executed without further discussion, and an agreement signed by the attorneys for the complainants and Durant that the writ of *ne exeat* should be discharged.

The suit in which the *ne exeat* was issued seems to have languished for a long time, but was finally proceeded with, and the complainant Griswold having learned that there was an intention of pressing the suit with a view to make him responsible on the bond, and that the bond was claimed to be something more than an ordinary bail bond, endeavored by petition to the Rhode Island Court to procure a discharge of his obligation upon making a surrender of Durant, basing his application on the ground that the bond should be *interpreted* as being one for *appearance* only, to abide the orders of the Court. Upon the failure of this endeavor the present bill was filed.

The general grounds upon which the cancellation or reformation of the *ne exeat* bond was sought were

that it was executed upon the understanding that it was a bond merely for the *future appearance* of the defendant in the *ne exeat* suit, Durant, and not an absolute undertaking that Durant should *pay* the amount of any judgment or decree which might be rendered against him in that suit; that if this was not the clear understanding of *both* parties, it certainly was that of the obligor Griswold, and that the obligees well knew, or had good reason to know, that such was his understanding; that if the bond was really to be interpreted as such an onerous undertaking (and it has been so interpreted) its execution was in consequence of a *mistake* against which equity would afford relief; and that it would be a *fraud* for the obligees to attempt to enforce such an instrument, taken under such circumstances as an absolute obligation to pay money.

The pleadings and proofs exhibited the case where an obligation (as it was eventually interpreted to be) of an *unusual* character, namely, that of *suretyship*, had been assumed, and raised what may be regarded as three questions:

First.—Was it not clearly proved by a greatly preponderating weight of evidence, so as to justify no doubt, that the bond (assuming that the above-mentioned interpretation is to be placed upon it) was executed upon the understanding by both parties that it was a very different instrument? In other words, in consequence of a mistake?

Second.—If not exactly this was it not at least clearly proved that the obligor, Griswold, so understood it, and the obligees, or their agents, who took it, well knew or had good reason to know that such was his understanding, and is not an attempt to enforce it on their part under such circumstances a fraud which a court of equity will prevent?

Third.—Considering the peculiar nature of the instrument, one of *suretyship*, and the circumstances under which it was executed, must the Court not be satisfied before allowing it to be enforced by affirmative evidence on the part of those who seek to enforce it, that its true character was well understood by the obligor when he executed it?

The learned Court below seems to have viewed the case only as the *ordinary* one where an instrument is attempted to be impeached on the ground of fraud or mistake; and, invoking the ordinary rule that in such cases the fraud or mistake must be clearly proved, declared that this had not been done to its satisfaction and dismissed the bill. The consequence is that the complainants in the Rhode Island suit have gained by their *ne exeat* (if the bond is to be interpreted as it has been interpreted by the Court below, as a bond to perform the decree), a security which it is not the purpose of that writ to give, and which never could have been exacted under it; and this against the testimony of four unimpeached witnesses and with the support of two only.

It seems to the undersigned somewhat extraordinary that the case should have been regarded and treated in the Court below as the *ordinary* one of an attempt to impeach a written instrument on the ground of fraud or mistake in which the complainant must establish his allegations in the clearest manner, so that the Court can entertain no doubt.

It will be argued with confidence by the undersigned that even under such a rule there was no justification for the preference of the testimony of two witnesses to that of four; but that when it is considered that the obligation against which relief is sought is one of *suretyship* of an extraordinary

character, and gained under very unusual circumstances, it becomes at once manifest that the decree appealed from is erroneous.

Specification of Errors Relied Upon.

First.—That the Court below erred in overlooking the distinguishing feature of the case that the obligation sought to be cancelled or reformed was one of *suretyship*, and was entered into under circumstances well calculated to create *misapprehension* in the minds of the obligors as to its real character;

Second.—That the Court below erred by acting upon the view that in order to entitle the complainant to relief it was necessary to show that *both* parties to the instrument understood that it was to be a bond for the *appearance* only of Durant in the equity suit, and that it was not enough to show that the complainant, Griswold, supposed it to be of that character, and that the obligees took it, well knowing or having good reason to know that such was the belief under which the complainant Griswold was acting.

Third.—That the Court below, even upon the view that the case was the ordinary one of an attempt to impeach a written instrument on the ground of mistake, and without reference to the points of the character of the obligation as being that of suretyship, and of the peculiar circumstances under which it was procured, erred by deciding against the weight of evidence that the mistake was not sufficiently proved.

POINTS.

First Point.—That the case is one of equitable jurisdiction will not be doubted. If the legal interpretation of the bond is to subject the complainant to an absolute liability for the performance of the decree in the Rhode Island suit, the allegations that it was procured by fraud or mistake clearly give the court of equity jurisdiction.

But even if the interpretation were otherwise, the jurisdiction is clear. That the construction of the bond is *matter of doubt*, and that the obligees insist that it imposes the absolute liability above mentioned, is fully sufficient to give a court of equity jurisdiction to cancel or reform, if the instrument was procured by fraud or mistake. Courts of equity permit no man to hold a paper which has been exacted inequitably, even if the ultimate decision of a court of law might relieve him from liability. If such decision should affirm the liability, the death of witnesses and the loss of other evidence might prevent him from establishing his equitable rights.

Barber *vs.* Barber, 21 How., 582.

Second Point.—But there is another ground upon which the jurisdiction in equity is clear. It is the case of a *surety* seeking relief from an

instrument procured from him inequitably, by taking advantage of his misapprehension and mistake.

Samuel *vs.* Howarth, 3 Mer., 272, 278.
Ruilton *vs.* Matthews, 10 Cl. & Fin., 935.

Third Point.—A clear notion of the purposes of a *ne exeat*, and of the proceedings thereunder, is requisite to a just understanding of this case. The *immediate* purpose and the exigency of this writ was to compel security that the defendant named in the writ should not depart from the jurisdiction without first obtaining leave of the Court. Its general object and substantial effect were precisely like those of a *capias ad respondendum* at law.

1. In a suit in equity to compel a defendant to pay money, or do any other affirmative act, the Court compels a performance of its decree through its ability to imprison the defendant until he shall make performance. Precisely the same means were relied upon, while imprisonment for debt was authorized, in a suit to compel the payment of money. The *form* in the two cases was somewhat different, but the substance was the same. In the one case imprisonment followed the failure of the sheriff to find property sufficient to satisfy the judgment. The law gave

the process without special application to the Court, and not because the defendant had failed to obey any order. Indeed there would be no *order* that the defendant should *do* anything. The judgment was that "*the plaintiff recover*," &c., &c. In the other case the process of imprisonment arose as a *punishment* for a supposed *contempt* committed by the defendant in not doing what he was expressly commanded to do. But in each case the instrumentality was the same—the power of dealing with the defendant's body.

2. Hence two analogous forms of bonds were given, the object in each case being to secure the presence of the body within the reach of the process of the Court. In the suit at law we have bail to the sheriff and bail to the action. Upon the defendant's arrest he might give bail to the sheriff, for the sufficiency of which the sheriff was originally responsible, and the condition of which was that the defendant would appear and put in bail to the action. This served the temporary purpose of enabling the defendant to procure his release, but did not discharge the writ. When, however, he appeared and put in bail to the action, the office of the writ was discharged, and the sheriff relieved from liability.

So, also, on a *ne exeat*, the defendant may give to the Sheriff a bond that he will not

depart the jurisdiction ; this leaves the writ in full force ; but the object of the writ being merely to obtain security that the defendant will be within the jurisdiction so that process against his person may issue, and not to actually restrain him of his liberty, he may have the writ discharged upon motion, and upon giving security to become amenable to the orders and process of the Court. Such a bond makes the surety liable only in the case the defendant is not forthcoming so as to be amenable to process, and is the precise equivalent of bail to the action in a suit at law.

(*a*) "Granting the writ, it will be left open "to an application to discharge it, giving "security ; and then it will be exactly the "question in a court of law (Russell *vs.* "Ashby, 5 Ves. Jr , 96, 97).

"It is a matter of course to order the *ne* "*exeat* to be discharged upon the defend- "ant giving security to answer the com- "plainant's bill and to render himself "amenable to the process of the Court "pending the litigation and to such pro- "cess as may be issued to compel a per- "formance of the final decree."

1 Barb., Ch. Pr., 655.

(*b*) For further authorities on *ne exeat*, see

McNamara *vs.* Dwyer, 7 Paige, 239.
Mitchell *vs.* Bunch, 2 *ib.*, 621.
Johnson *vs.* Clendenin, 5 Gill & J., 463.

3. Although a bond to the Sheriff upon the defendant's arrest under a *ne exeat* is conditioned that he will not depart the jurisdiction without leave, and such a departure in strictness forfeits the bond, yet this rigor is not actually enforced, and the sureties may be relieved from liability upon bringing the defendant within the jurisdiction and procuring a discharge of the writ by giving security required for that purpose. The object of the writ is in that case perfectly accomplished.

Brayton *vs.* Smith, 6 Paige, 489.

4. It will be seen from the above that, although, according to the defendant's testimony in the present case, the reason why the anomalous bond was exacted was that Durant declined to give the bond called for by the writ on the ground that he could not give such a bond for the reason that he wished to leave the State on the next Monday; his impression that such a step would have been hazardous was an error. He could with safety to his sureties as well as himself, have given the bond relying upon the indulgence of the Court to discharge the writ upon giving the usual security for that purpose. Though there is no regular provision for *technical surrender* under a *ne exeat*, the Courts pursue, on special application the analogies of bail at common law.

Brayton *vs.* Smith, *supra*.

5. It will also be seen that whether the complainants in the suit against Durant either made some affirmative misrepresentation, or took advantage of a misapprehension on the part of Durant, they succeeded in getting a security which Durant was under no necessity of giving. If their sincere wish had been, as they asserted it was, to relieve Durant from present arrest and from any supposed obligation to remain within the jurisdiction, they could have taken the usual bond given upon the discharge of a *ne exeat* and have agreed, just as they did agree, that the writ should be discharged. Such a bond would have been completely effectual for every lawful purpose they could have had in view in procuring the arrest.

6. Nor is it immaterial to observe at this point that the complainant Griswold had no counsel at all, and that Durant's counsel knew little of the nature of a *ne exeat*, or of the practice under it. This is no reflection upon that gentleman, who was called hastily at midnight and had no time to instruct himself concerning the practice. It is said that one occasion only before this had a *ne exeat* been issued in Rhode Island. The attorneys and counsel for the complainants, on the other hand, may safely be assumed to have made full study of a writ which was to play such a vital part in the suit they were beginning. (Record p. 42.)

Fourth Point.—Even upon the erroneous rule applied by the learned Court below that the burden was upon the complainant to establish in the clearest manner that the bond actually executed on Monday morning was not such an one as had been agreed to be given on the preceding Saturday night, the decree appealed from is, it is respectfully submitted, erroneous. The clear weight of the evidence established the allegation of the complainant that the bond agreed to be given was the ordinary bond given on the arrest of a defendant, which is satisfied by his presence within the jurisdiction so as to be amenable to the process of the Court in the action; and the substitution of the instrument actually executed, was either a mistake, or a fraud.

1. There are some undisputed facts to which the learned Court seems not to have given attention.

a. Intelligent men are generally familiar with the ordinary proceeding of giving bail for a party under arrest in a civil suit. They do not usually know anything of the difference between a *ne exeat*, and a *capias ad respondendum*: but it may be safely said that the universal understanding is that upon giving bail in a civil suit, the undertaking is that the defendant shall be forth-

coming to answer the process of the Court issued against his person, and *not* that the sureties shall be absolutely liable to pay any judgment which may be rendered against him.

b. That this modified liability was the only one which the complainant was *asked* to assume when he was applied to, and that it was this only which he *expected* to assume when he went to the jail, is positively sworn to and in no manner denied.

Deposition of Gray, p. 30.
Deposition of Griswold, p. 37.

(*c.*) That Mr. Griswold was almost a total stranger to Durant is also sworn to and not contradicted. The fact of his high reputation for intellectual and business capacity was proved by the defendants themselves, as if that circumstance tended in their favor.

Record, p. 32.

2. Allegations of fact require more or less evidence to establish them according as they are more or less affected by antecedent improbabilities. There are some things which are so much in the ordinary course of events that the mind accepts them upon a comparatively small amount of proof, and is sometimes

almost impatient at any contradiction or question of them, and others so unusual and extraordinary that the mind is disposed to promptly reject them unless they are substantiated by unquestioned evidence. The proposition of the defendants is that Mr. Griswold, a man of perfect intelligence and great business experience, asked to give bail for the *appearance* of a a man under arrest, to whom he was nearly a stranger, consenting under the impression that the hospitalities of a watering place had been invaded, and going to the jail to give *such bail* only, assented *immediately, without demur*, or *asking for security* for himself, or even for any *explanation*, to become absolutely bound for a possible debt of this stranger to the amount of $53,000 and upwards! All this may be true; but reasonable minds will be cautious about accepting it, unless it is established by an amount of evidence sufficient to silence all question, or the singularity of the occurrence be satisfactorily explained by some circumstance other than any proved in this case.

3. There is another undisputed fact which one of the attorneys for the defendants testified to with expressed reluctance, because he seemed to fear that it might be regarded as unprofessional, but which, nevertheless, he thought tended in favor of his clients, and which, therefore, he supposed he was not

at liberty to withhold. This is, that one of Hazard's lawyers, Mr. Peckham (pp. 44, 45), meeting Mr. Griswold in the street in Newport in October or November, 1868 (some two months only after the transaction), the latter "spoke of this bond *as if it were a bailbond*," whereupon the witness proceeded to correct what he considered an erroneous impression, by describing to him the bond as one upon which "he might be liable to pay money." Surely, it is manifest from this that, *at this time*, the belief in Mr. Griswold's mind was that he had executed only an ordinary bail-bond; but how could this be, if, only two months before, when executing the bond, it had been *carefully explained in his hearing* that it was a bond of a very different character?

Nor is the inference justly to be drawn from this statement repelled by the further statement of the witness Peckham, the correctness of which is denied, that he then explained the nature of the bond to Mr. Griswold showing him that it might call upon him for the payment of money, whereupon the latter said, "Well, I guess you are right." This observation was evidently based upon Mr. Peckham's statement of the tenor and effect of the bond itself, and not upon anything which was agreed upon on the Saturday night when the arrest was had. Mr. Griswold might well enough have assented to such an interpretation of the bond without at all agreeing that it was such an instrument as he had agreed to execute, and supposed he was executing.

4. And if the complainants in the suit intended to exact security for the alleged debt, and not bail for appearance, &c., why was the precise sum endorsed upon the writ of *ne exeat* as the amount in which bail was to be taken adopted! Why was not a demand made for security in some larger sum? Fifty thousand dollars was but a small part of the demand. But the sum endorsed on the writ was taken without a word of question. It was the precise sum, which the Court would have fixed, in the absence of other reasons, for a bond to be given upon *discharging* the writ.

5. In view of the circumstances above mentioned which certainly make it in the highest degree *improbable* that the complainant knowingly executed an instrument which made him an absolute security for the payment of a debt, where is the ground upon which the testimony of four witnesses should be rejected in favor of that of two? In such cases of conflict, where none of the witnesses are impeached, numerical superiority certainly should go for something; but when reinforced by all the probabilities, there cannot be any danger in allowing it a decisive effect.

6. The reason assigned by the learned Court below for preferring the testimony of the smaller number of witnesses was that they

were *placed in a position* where it was their *duty* to understand clearly themselves, and see that others undertsood, what security was to be given that there might be no misunderstanding afterwards when the bond came to be executed (p. 61). But this is a misapprehension. What particular occasion was there for such precision of understanding on the part of Hazard's legal advisers? It would not operate to bind Durant to perform his agreement to appear. For that there was to be no security but honor. And if he did appear, and refused to give such security as they should exact, he would be detained in custody. A misunderstanding could not avail to make Hazard accept a less effective security than he desired. It *might* result in giving him a better one than he expected. This argument of the learned Court is really founded upon the supposal that it was for for the *interest* of the complainants in the suit that there should be a clear understanding. No such interest is perceived. Had it really existed, the true precaution would have been obvious. Nothing could have been easier than to ask a scrap of writing from Griswold himself.

Fifth Point.—But there is a special rule of law framed for cases of which the present is an instance, and which furnishes an impregnable ground for this appeal. The question is one of *suretyship*. And the case is one where the obligation was assumed under *unusual circumstances calculated to mislead*, and where it is unreasonable to suppose that it would have been assumed had the appellant understood the nature of the obligation.

In such cases it is incumbent upon the party seeking to enforce the obligation to satisfy the Court that it was well understood by the surety when he assumed it. Otherwise no recovery can be had upon it at law, and protection against it will be afforded in equity. This well established rule was wholly ignored by the learned Court below.

1. The *general* rules of low are framed for the ordinary and usual transactions of men. They assume that all the parties to transactions are equally intelligent, equally honest, and that no one of them is more likely than another to be *misled*. This assumption accords with the general fact, and is justified by it.

Under these rules, which are those which the Court below applied in the present case. if a party asserts that an obligation which some other seeks to enforce against him was was procured from him by fraud, or assumed by mistake, nothing is clearer than that the

burden is upon him to clearly prove that fraud or mistake by affirmative and preponderating evidence. The other party is under the burden of no adverse presumption, and is not required at the start to defend himself by any proof.

But there are other cases of special and exceptional character which call for the application of quite different rules.

The difference, however, is rather a difference in respect to *evidence*. Courts mean to enforce only *fair* contracts, but where a contract is in writing, and neither party is under any disadvantage, the contract must be *presumed* to be fair. And where the attempt is made to show it to be the fruit of fraud or mistake, inasmuch as the attempt is generally supported by *oral* evidence only, Courts recognize the fallibility of this species of proof and the danger which attends it.

In order to avoid these dangers, and at the same time prevent *injustice*, Courts look to the *situation*—a matter which is usually beyond dispute—and act upon rules which good sense and long experience have recognized as applicable.

(*a.*) If the relations between the parties are those of *confidence*, and the party who is looked to for advice or assistance has taken a deed or contract from the other, the Court at once regards the situation as exceptional, and as one frequently leading to the practice of *unfair advantage*, and so likely

to involve this practice as to make it wise to require the party seeking to enforce the deed or contract to *satisfy the Court* by affirmative proof that the transaction was entirely fair.

(*b.*) If one of the parties has *power* over the other, either physical or moral, and has taken from him a deed or contract, it is viewed with the like suspicion, and the same rule is applied, although in such cases there is no element of confidence reposed; indeed *distrust* is usually present.

(*c.*) If the situation is that one party perceives that the other is acting under some misapprehension, it matters not whether of law or fact, and *takes advantage* of such misapprehension to secure an agreement which might not otherwise have been given, the transaction falls under the same rules, and the party cannot enforce his contract unless he *satisfies the Court* that the misapprehension was removed before the engagement was entered into.

(*d.*) The reason of this doctrine is derived from the teachings of experience. Experience has shown that in such situations an improper advantage is so *easily* and so *often* gained, that the law looks upon such a result as *probable*, and makes a rule

founded upon this probability that such transactions should be viewed with jealousy. Various elements enter into the rule. Besides the *probability* referred to, there is the *difficulty of proving* that unfair advantage was taken; for usually this is done without anything being said in the way of affirmative misrepresentation, the situation being itself sufficient to secure the object, and there is manifest *justice* in requiring those who purpose to obtain such agreements to *see to it* that they have proof that those with whom they deal are acting with a correct understanding.

All the instances above given are but illustrations of the broad rule of equity that the Court will not allow an instrument to be enforced which subjects a party to a *great burden*, or deprives him of an *important right*, when the *circumstances under which it was executed* are such as are calculated *to throw parties off their guard*, unless there is clear *affirmative* evidence that the party sought to be held understood at the time the effect which would be claimed from his act. The rule is not confined to cases of influence on one side and confidence on the other; but extends to every case in which the *situation* is such as to lead to the execution of deeds or papers which may have a very different effect from what would *naturally be expected*.

Hamilton *vs.* Watson, 12 Cl. & Fin., 109, 119.

Franklin Bank *vs.* Cooper, 36 Me., 179, 197.

2. The case of *suretyship* is a well pronounced instance in which this adverse presumption is made which must be removed by affirmative evidence. At one time the mere fact that the contract was one of suretyship, was sufficient to awaken the judicial suspicion. The rigor of this doctrine has been in some degree modified. But it is believed that there is entire concurrence in the view that where, in addition to mere suretyship, the engagement is of an *unusual* character, such as it is unlikely that a party would enter into under the circumstances, in other words, where the situation was such as to *naturally mislead the surety*, the creditor must remove the adverse presumption.

(*a.*)—The grounds and reasons which bring the case of suretyship within the scope of the doctrine hereinabove stated are found in the nature of that engagement. The man who becomes a surety is not, in general, engaged in his own personal business; nor acting under the motives by which men are governed in their own affairs. He is acting in the business of *another*, and from the humane or charitable motive of giving *aid or succor* to another. He cannot be expected to *understand* the business in which he is acting as he understands his own. He must necessarily rely upon the representations of others, either of his principal, or of *the creditor*. He is less capable of protecting himself, and less

upon his guard. Moreover he is receiving no consideration valuable to himself. These circumstances combine to make the action of the surety *liable* to misapprehension and mistake.

(*b.*) Says Lord Westbury in Williams *vs.* Bayley (1 Law Rep. (Eng. & Ir. App.) 200, 218). "A contract to give security for "the "debts of another, *which is a contract with-* "*out consideration*, is, above all things, a "contract which should be based upon the "free and voluntary agency of the in- "dividual who enters into it."

In this case a transaction was set aside whereby a father agreed to become surety for the debts of the son. The doctrine of the decision was that in such cases the Court must be *affirmatively satisfied* that the act was free and voluntary.

"Very little said which ought not to "have been said, and very little not said "which ought to have been said, will be "sufficient to prevent the contract (of "suretyship) from becoming valid," (Fry, J. in Davies *vs.* Lond. Prov. Mar. Ins. Co. 8 Law Rep. (Ch. Div.) 469, 475.

See also :

Hamilton *vs.* Watson, 12 Cl. & Fin. 109, 119.

Wythes *vs.* Labouchere, 3 D. & J. 593, 609.

DeColyar on Guarantees, Am. Ed., 36 *et seq.*

Brandt on Suretyship, §§ 365, 366.

Baylies on Sureties, 293.

(*c*). In such cases the same principles which require that the contract should be shown to be free and voluntary, manisfestly require also that it be shown that the surety fully *understood* his act. Vice-Chancellor Kindersley in Small *vs.* Currie (2 Drewry, 102, 119) says: "Now, I have no hesitation "in stating it is my clear opinion that a "creditor taking from a surety, a bond to "indemnify him against the bankruptcy "or insolvency of his debtor, is bound to "disclose, voluntarily and without wait- "ing to be asked, any facts within his "knowledge material for the surety to be "acquainted with relating to the pecuniary "condition and solvency of the debtor; "and his omission to do so is fatal to the "indemnity." This is of course for the reason that the Court must be affirmatively satisfied that the surety undertook the extraordinary engagement *with full understanding of its import*. If this be so in the ordinary case of a surety, how much more must it be important for the Court to know in the present case that the obligation was intelligently assumed, when it appeared that the appellant, without any ties of relationship, or even friendship, went to the jail in order to give common bail for a civil prisoner; and, at once, agreed without hesitation or demur, to a paper which made him an absolute surety for his debt?

(*d*.) Lord Westbury in the case above cited

(Williams *vs.* Bayley), in which the guaranty was set aside on the ground of undue pressure—pressure, however, which was but scantily proved—in order to show how strongly equity presumed against such transactions, said: "I have no hesita-
" tion in saying that no man is safe, or
" ought to be safe, who takes a security
" for the debt of a felon from the father
" of the felon under such circumstances."
And yet there was in this case no proof, except of a somewhat doubtful intimation by the creditors that they might take some criminal proceedings against the son. But the Court would not allow such an agreement to stand unless they were *certain* that it was freely and intelligently entered into. It was nothing but the *situation* which made this requisite. It was because of the unusual character of the engagement—its want of valuable consideration, and liability to be affected by mistake—that this removal of every doubt was demanded. The same importance which equity assigns to proof that a transaction should be free from undue pressure, it will also assign to proof that it was intelligently entered into.

See also

Lynn *vs.* Whiton, 1 H. L., 333.
Phillips *vs.* Foxall, 7 Law Rep., Q. B.

(*d*). Kerr well states the rule which should be applied in the following language:

"But if there be anything in the transac-
"tions that might not *naturally be ex-*
"*pected to take place* between the parties
"concerned in it, the knowledge of which
"it is reasonable to infer would have pre-
"vented the surety from entering into
"the transaction, the creditor is under an
"obligation to make the disclosure."
(Am. Ed. of Fraud and Mistake, pp. 122, 123).

(*e.*) The authorities upon this question include decisions upon the kindred topics of *fraud* and *mistake*. They are countless in number and infinitely diversified in circumstance. The best general view is exhibited by Kerr in his work on Fraud and mistake (Chap. 1, Section III., on Fraud Presumed, and Chap. II. on Mistake). Mr. Pomeroy in his work on Equity Jurisprudence (§§ 846 *et seq.*), has also treated the subject with close attention. His summary of this branch of the law is very valuable, although some of his formulas may be criticised. Absolute similarity in precedents is extremely rare in this branch of the law, but the following authorities will be found instructive:

Meadows *vs.* Meadows, 16 Beav., 401.
Millar *vs.* Craig, 6 Beav., 433.
Cocking *vs.* Pratt, 1 Ves., Sen., 400.
Brown *vs.* Lamphear, 45 Vt., 252.
Cholmondeley *vs.* Clinton, 2 Mór., 352.
Paget *vs.* Marshall, 28 Ch. Div., 255.
Garrard *vs.* Frankel, 30 Beav., 445.

(*f.*) Like many other principles now recognized both in Courts of law and equity that now under notice had its origin in the jurisprudence of equity; but its application to cases of suretyship has been observed to be so clear that it is now recognized in Courts of law.

Says Mr. Justice Bayley in Pidock *vs.* Bishop (3 B. & C., 605, 610). "It is the "duty of a party taking a guaranty to put "the surety in possession of all the facts "likely to affect the degree of his respon- "sibility, and if he neglect to do so it is at "his peril." In this action which was at law, the surety was held discharged because of a failure to communicate to him the circumstance that the price of the goods to be bought and for which the surety was to be bound was to be above the market price, and the excess to be applied on a former debt.

The language of Kindersley V. C., in Small *vs.* Carrie (2 Drewry, 114), is still more pertinent to the present case. "If "indeed the person taking the indemnity "does either by the *frame of the in-* "*strument*, or by any *representations* "made to the surety, *or in any other man-* "*ner*, mislead the surety as to the effect of "it, or occasion his missapprehending it, "*or takes advantage of his ignorance*, or "distress, or induces him to execute the "instrument under circumstances by which "he is deprived of the means and oppor- "tunity of having legal advice and assist-

"ance, *or if he knows, or has reason to* "*believe* that the surety misapprehends the "the nature or effect of the instrument, "and allows him to execute without re- "moving such missapprehensions by suf- "ficient explanations; in any such case no "doubt a Court of equity would interfere "to prevent any advantage being taken of "bond of indemnity so procured." And we have the authority of Lord Eldon for the doctrine "that at present it is firmly "established that the same principles which "have been held to discharge the surety in "equity will operate to discharge him also "at law." (Samuel *vs.* Howarth, 3 Mer., 272, 279). And the same authority holds in the same place, that if the party comes into equity seeking relief he will not be sent to law; that the jurisdiction is concurrent and will be administered in either Court.

Sixth Point.—The present case is closely embraced by the foregoing doctrine. It is one of the attempted enforcement of the obligation of suretyship; and that obligation was entered into by the appellant under a *misapprehension*, which, if the appellee did not create, (which we contend he did) he most certainly knew, or had reason to know, and took advantage of. We shall endeavor to maintain this proposition without borrowing any aid from disputed facts.

1. That the case is one of suretyship is, of course, not denied.

2. That the purpose of the process on which Durant was arrested was simply to obtain security that Durant's body should be within the jurisdiction to be amenable to orders and decress in the cause is plain. Nobody pretends that when Griswold was applied to to become bail, any other sort of bail was contemplated or regular. He could not have been applied to to become any other sort of bail, and the evidence is conclusive that he was not applied to to enter into any other engagement, and no witness pretends to the contrary.

3. It is not reasonable to suppose that he would

knowingly have become security for any debt of Durant, certainly not one for $53,000. Or if this is too much to say, it is, at least improbable that he would take upon himself such a hazard. Durant was *almost an entire stranger* to him.

4. That he went to the jail where the interview was had, willing to become ordinary bail, and with no *expectation or purpose* of assuming any larger liability is therefore beyond dispute.

5. The appellees themselves took the trouble of proving, as if this had any other effect than to add to the difficulty of their position, that Mr. Griswold was a man of exceptional intelligence and business capacity (p. 32). Such men may suffer under misapprehension as well as others, but they do not often become sureties for the debts of strangers to the amount of $50,000.

6. The extraordinary thing—incredible, unless explained—is that this intelligent man going to the jail for the sole purpose and with the sole expectation above stated, should at once, (for this is the proposition of the appellees) upon its being stated

by Durant that he could not give ordinary bail for the reason that he was obliged to leave the State (meaning, of course, that he would be obliged to forfeit the bond if he gave it, and he could not ask strangers to be sureties on a bond which they knew would be forfeited and subject them to liability) without inquiry, demur or hesitation, and in a few minutes after his arrival, agreed to execute a bond which made him the permanent surety for Durant to the amount of upwards of $50,000 !

Has a Court of Equity ever sanctioned the obligation of a surety taken under such circumstances without the fullest and most satisfacthory explanation? That a man should go into a room where a complainant with his bailiff and counsellors had his prisoner, with the purpose only of becoming ordinary bail, without counsel for himself, and emerge in fifteen minutes (pp. 46, 57), under an obligation which made him permanent surety for the debt of a stranger to the amount of $53,000, is not one of those ordinary matters which Courts accept as true without the most satisfactory proof.

Seventh Point.—The burden of explaining and vindicating this transaction rested, therefore, upon the appellees. It was for them to clearly *satisfy the Court* by convincing evidence that Mr. Griswold was under no misapprehension, but that he made the agreement, and subsequently signed the bond, with knowledge that it was a wholly different instrument from that which he expected to execute when he reached the jail, and that he really understood that he was assuming the extraordinary liability which the bond in question purports to impose.

The failure to discharge this burden is absolute.

1. Bearing in mind that this obligation to satisfy the Court by affirmative proof of Griswold's full understanding of the transaction *was the obligation of the appellees* all pretence that it was discharged must be abandoned in the face of the fact that the attempted explanation was supported by two only of the witnesses, and was denied by four.

2. Nay, more; the appellees themselves disproved their own attempted explanation. The witness Peckham, attorney for the appellees, as already mentioned under another head, testified with apparent reluctance, because it seemed unprofessional to a conversa-

tion with Griswold some two months after the transaction, in which the latter "spoke of this bond *as if it were a bail-bond*" (p. 44). The witness did not pretend that that this was not the sincere expression of the thought in Mr. Griswold's mind. But how did this notion get there, if but two months before, when the transaction was had, he fully understood that it was *not* a bail-bond, but a bond which made him a permanent and absolute guarantor of a debt? (Record, pp. 44, 45.) Nor, as already observed, is the inference to be justly drawn from this statement of Griswold, repelled by the further testimony of Peckham, that he then explained the nature of the bond to Griswold and showed him that it might call upon him to pay money, and the latter answered, "Well, I guess you are right." He might make Griswold believe that the bond he had signed, by its language, made him a guarantor; but this is a quite different thing from making him acknowledge that this was so understood when the bond was agreed upon.

Griswold, indeed, denies this alleged conversation; but, *as against the appellees*, it is to be taken as true.

3. If anything were wanted to complete the appellant's case, the explanation attempted by the appellees' witnesses of the way in which this extraordinary bond came to be

given, would supply it. The witness Peckham says that at the meeting in the jail on Saturday night, Durant stated, in answer to the suggestion from Judge BRADLEY, that all he had to do was to give the bond called for by the writ (which was a bond not to depart from the State), that it was "out of the "question for him to give it; that he couldn't "remain any longer in Rhode Island; that "his presence was absolutely demanded out-"side of the State; and that he must leave "here Monday morning" (p. 43). Judge BRADLEY substantially concurs in this statement (pp. 46, 47).

The reason, then, according to these witnesses, which moved Durant to say that it *impossible* for him to give such a bond was the necessity he was under of leaving the State. But this, of course, would not *prevent* him from giving such a bond, if he could get sureties upon it. It would entail upon him personally no greater liability than the bond which was actually given. He would not be liable, in any event, on any bond, unless a decree were finally rendered against him, and if one were rendered, he would be liable independently of having given a bond. He was the party charged with the liability, and no bond given by him could add to his liability. The difficulty, therefore, in the way of his giving such a bond must obviously have been that he could not furnish *sureties* for such undertaking; that he could not *ask* those who came to give simple *bail* for him to become his sureties on a bond which

he expected immediately to forfeit; nor would they give such a bond should he ask for it. In order to avoid this difficulty, according to these witnesses, he agrees to give, and does give, *another* bond upon which the sureties assume a still greater, because more certain, liability! If the bond called for by the writ had been given, there could have been no loss to the sureties unless a decree had been rendered against Durant; and even then the liability might have been relieved against on application to the Court for leave to surrender the principal. But, under the bond actually given, the liability, in case of a decree, would have been absolute, without any chance of relief!

4. This explanation conclusively proves the very thing which it was supposed to disprove. The substance of it is that the bond executed was adopted in place of the one called for by the writ of *ne exeat*, because Durant believed it did not involve his sureties in any onerous responsibility. If this is true, he was under a total delusion. The sureties must have been under the same delusion. If they had been willing to assume the responsibility which it has been held they actually did assume, they would not have hesitated to accede to a request from Durant to join in a bond such as called for by the writ, because under it their responsibility would been less.

5. Will the argument be ventured by the appellees that they cannot be affected by the delusions of Durant and his sureties, unless it be shown that such delusions were created by there words or acts? Will they say "Durant may have supposed that a bond "such as called for by the writ would have "entailed an absolute liability upon his "sureties in case of his departure from the "State, and the bond actually executed a "less certain one; but our counsel were not "his advisers; he had his own counsel"? This position would involve them in an awkward dilemma; for they were themselves either under the same delusion, or they were not. If they were, confessedly the whole thing was a blunder, and a liability was imposed upon the sureties which neither party intended, or expected, they were to assume. If they were not, they are in a position not susceptible of defense. It would be that of a party who perceives that the one with whom he is dealing is laboring under a mistake, and jumps to take the benefit of it.

6. Perhaps this last conclusion may be denied by them, and they may say: "We "were dealing at arm's length. We had our-"selves only to take care of." But this argument, if anywhere permissible, certainly is not so here. It involves a confession of fraud. This was not an occassion in which parties came together to make a contract

about some ordinary matter of business; but a *conference*, in which the understood, if not the expressly avowed, object was a *common one*, namely, to so arrange the matter that the legal proceeding should have its lawful effect of giving the complainants in the suit the security to which they were entitled, without subjecting the defendant to needless inconvenience. Hazard himself testified that he called Judge BRADLEY from his bed to go and see what could be done to prevent Durant from remaining in jail over Sunday (p. 53).

7. But, under the supposals of the last argument, the conclusion of fraud does not by any means rest upon inferences derivable from the mere situation alone; although this would be enough. It is fully supported by direct testimony. Which party *proposed* this bond? Whose conception was it? Whoever did propose it suggested it as a means of avoiding the liability to which, *in the mind of Durant*, the sureties would be subjected by such a bond as was called for by the writ. It was certainly not Durant. Nor was it Gov. Van Zandt. He, confessedly, knew too little about proceedings under a *ne exeat* to be fruitful in suggestions. There can be no doubt that the suggestion came from the counsel for Hazard and the other complainants. All the suggestions evidently proceeded from that source. Mr. Peckham says

(p. 43), speaking of the first suggestion which was made: "Judge BRADLEY said 'that "(meaning the release of Durant) is a simple "matter. Let him give the bond called for "by the writ'" Then came Durant's declaration that he could not give that because he was obliged to leave the state at once. Next "it was suggested," says the witness, "that he might file his answer and apply for "the discharge of the writ immediately." This plainly proceeded from the same source, for it was rejected by Durant, on the ground that he could not remain even to do that (p. 43). "It was then proposed," continued the same witness, "that he should give a bond, "&c., conditioned to abide and perform "whatever decrees the Court might make "against him in those suits." And further on he says (p. 44): "Mr. Van Zandt then "announced that they would give the bonds "'*proposed*.'" It was the Durant party which *accepted* the proposal. And all doubt is removed, if any there could be, by the express statement of the witness, Gov. Van Zandt. He says (p. 55): "It was pro-"posed by Judge BRADLEY that Dr. Durant "should give a bond with two sureties, "which should be substituted for the writ, "and the writ discharged."

It, therefore, comes to this, upon the supposal now indulged, that the appellees' counsel, seeing that Durant was embarassed by the difficulty in his own mind that he could not get sureties, or even ask for them, to go upon his bond not to depart from the state,

when his purpose was to immediately do something which would forfeit it, suggested, by way of avoiding that embarrassment, the giving of a bond which would completely involve the sureties whether he departed or not! Such a fraud as this will hardly be avowed. Gentle suggestion to a party already a delusion is vastly more effective than the strongest misinterpretation.

8. Nor can it be said that the preceding argument takes too little notice of the circumstance that Durant had counsel present. That gentleman could not well be counsel for Griswold also. The interests were wildly different; and, besides, Gov. Van Zandt frankly confesses his total inexperience in such cases and states the reason (p. 42). Such ignorance could scarcely be imputed to the eminent lawyer who was Hazard's principal adviser. And both the counsel for the latter may safely be assumed to have made a recent study of the practice under the writ which they had procured. But the very hypothesis which we are dealing with assumes the same delusion on the part of Durant's counsel which he was himself laboring under. And such must have been the fact, for it had it been otherwise, the counsel would have corrected the error of his client.

9. It would be to no purpose to argue that

it does not follow that Griswold was under any delusion because Durant was. This assumes that Griswold was ready and willing in any case, to become an absolute surety for Durant's debt, an assumption for which there is absolutely no foundation. And it is impossible to suppose that Griswold had any clearer notion respecting the matter than Durant.

Eighth Point.—It is apparent that the explanation attempted by the witnesses for the defendants below of this extraordinary transaction serve only to create new difficulties. It at once puts them upon the defence of their own conduct. The case itself is susceptible of a simple and natural explanation which involves no impeachment of either parties or witnesses, except to the extent of imperfection of memory, quite usual when such a length of time has transpired between the event and the accounts of it by the actors. It is submitted as the most probable explanation that the sort of bond actually suggested to be given on the night of Saturday, August 22d, was the ordinary bond given under a *ne exeat* upon the *discharge* of the writ, the condition of which is that the defendant shall abide by the orders of the Court in the cause and render himself answerable to the process issued for the enforcement thereof.

1. That Durant expected to be released upon

giving ordinary bail, and that Griswold was applied to become such bail, and consented and went to jail for that purpose is quite indisputable.

2. That Rowland G. Hazard, the active complainant in the suit, as well as his counsel, simply desired such security as the writ of *ne exeat* called for seems equally certain. Hazard expressed his strong wish that something should be done to relieve Durant from the inconvenience of remaining under arrest during Sunday.

3. When, therefore, the parties met at the jail there was not on Hazard's side any purpose or desire either of exacting from Durant any unusual bond, or keeping him under arrest during Sunday. He was willing even to depart from the regular procedure to prevent such a result, and authorized Judge BRADLEY to use his name for that purpose (p. 53).

4. Judge BRADLEY himself stated at the outset, that the release was a very simple matter, that it could at once be accomplished by giving the bond called for by the writ. It was here that difficulty first arose.

The nature of this bond was briefly ex-

plained, evidently by Judge BRADLEY (p. 43). It is perfectly manifest from what follows the testimony just referred to that the explanation was that the bond would be forfeited by a departure from the State, whereupon Durant delared that he could not give such a bond. As already shown, this impossibility arose from his just supposal that no stranger to him would become his surety on a bond certain to be forfeited. Judge BRADLEY met this by the natural and obvious suggestion that he (Durant) should apply, at once, to discharge the writ, upon which he would be released by giving a bond to abide the orders of the Court and become amenable to its process, and which would not be forfeited by a departure. But this could not be done before the following Monday, and Durant justly feared that it might involve a longer delay and his business required his departure on Monday morning. But there was no difficulty whatever in accomplishing the purpose if Durant would then give such a bond as the Court would exact as a condition for discharging the writ, and the complainants in the suit would agree that the writ should be discharged. It would be merely doing by anticipation what would be done upon the application. It simply rested with the complainants to say whether they would consent without application to the Court, that the writ should be discharged. They might, on a sufficient case, successfully oppose an application for a discharge. *They did give the consent.* All they *ought* to have

exacted was a bond which would be satisfied by Durant's presence in the jurisdiction to submit himself to orders and process. Hazard upon his own statement could have *desired* nothing more. That is all that the Court would have required on an application to discharge the writ. This is all which four witnesses against two testified was exacted and in the face of all this to say that Hazard required absolute security, to the extent of the bond, *for the payment* of his alleged debt, and that Griswold, a stranger, consented without hesitation or demur, to give it, seems a most irrational conclusion.

5. It may be urged that the point now sought to be maintained assumes that it was not understood upon either side that a bond for the performance of the decree was to be given, and that there was, at least, one important circumstance inconsistent with such a view for which no explanation has been suggested, namely, the actual use of the word "perform" in the condition; that Mr. Peckham, who drew it was a lawyer and must have used this word intelligently, and that this of itself shows that his understanding of the agreement was; and that Griswold himself says that he read it, and must therefore be presumed to have known its meaning.

So far as regards Griswold's supposed knowlege of the meaning of the word, the argument is of little weight; the transaction

was a step in a legal proceeding in which instruments are framed in language sometimes wholly technical, and often in language which receives a peculiar interpretation. There were lawyers present whose business it was to see that the bond was drawn in proper form, and this would naturally be be left wholly to them. Mr Griswold's attention would not probably have been arrested so as to lead him to question whether the bond conformed to the agreement, unless some language had been employed in it at once indicative to a layman's mind of something different from the agreement. He says himself that if such language as "*pay* any decree" had been used his attention would at once have been arrested by it (p. 39). Moreover, the defendants below themselves proved that Griswold, in fact, had no suspicion that the bond was one to pay the debt, but supposed it was one for appearance only.

So far as regards Messrs. Peckham and Van Zandt, whose business it was to understand any paper writing, it is not at all necessary to impute either fraud to the former or ignorance to the latter. It is the practice of courts, and indeed the rule of law, to interpret all bonds, given in legal proceedings, and indeed all official bonds, so as to give them the effect which the law intends they should have, without scrupulous regard to their language (Waters *ex.* Van Vorst, 28 N. J. Esq., 103). In all such cases the *law* declares what sort of an instrument *should* be given, and the courts wisely assume that

the parties *intended* to do what the law prescribed. Hence the language employed in bail bonds, appeal books, &c., varies greatly in different jurisdictions, and sometimes even in the same jurisdiction, and it is one of the common things for courts to override the particular language employed, and limit the use to be made of the bond to the presumed *purpose* for which it was given. This is an illustration of a familiar equitable doctrine which has a much wider application. The declaring of deeds absolute on their face to be mortgages, when shown to have been intended only as security, the cutting down of penalties of bonds, so as to make them answer the purpose of idemnity only, are but instances in which Courts proceeds upon the view that the *situation*, rather than the particular language employed, determines what the real intent of contradicting parties is.

Lawyers particularly rely upon this practice and pay less attention to the precise language of instruments, where the law is supposed to determine their effect.

In Slocumb *vs.* Robert (16 La. [Curry], 173), a debtor, on arrest in a civil suit, had given a bond with surety to *satisfy* any judgment obtained from him, instead of the usual bond prescribed by law in Louisiana "that the defendant shall not depart the "State or leave the jurisdiction of the Court, "and that he shall appear to answer to the "judgment."

An attempt was made to enforce payment of the judgment from the surety. He pleaded *a surrender*. The Court sustained the

defense saying: "In such case the Sheriff "has no power to take any other bond than "that which he is authorized by law to "take. Any clause which is superadded "must be rejected, and any that is omitted "must be supplied."

A severer rule has sometimes been applied (Lloyd *vs.* McTeer, 33 Ga., 37).

Ninth Point.—The principal equity doctrine involved in the preceding points, beginning with the Fourth, is that which imposes upon a party setting up an instrument of an *unusual* character, and which he had secured to himself under *unusual* circumstances which gave him an advantage over the other, the burden of showing that it was well understood and fairly gained. Upon the basis of this doctrine a proposition more narrowly restricted to the present case may be stated, and which, it is submitted, will bear the closest scrutiny. This is, *that where a plaintiff in a legal proceeding is entitled by law to exact from a defendant a bond or security of a certain character only* and yet takes a bond with sureties of a *more onerous character, such as would not naturally be expected to be asked for*, it will be held invalid, at least as against the sureties, unless the plaintiff shows *to the entire satisfaction of the Court* that the sureties fully understood the nature and effect of the instrument actually executed by them.

Tenth Point.—The preceding proposition stands alone upon the fact that the bond was given in a *legal proceeding*, for which a certain bond of *a well defined character* was prescribed by *law*. It derives no aid from other material elements present in the case. It can be restated with intensified force by employing another element which the case affords. *Where a plaintiff has a defendant under arrest and takes from him a security as a condition of his release which is susceptible of an interpretation different from that to which he is alone entitled by law in such cases, it will be held void, or limited in its effect to that which the law prescribes, unless it is shown by the most satisfactory evidence aliunde that the intended interpretation was the intended one and that the security was well understood and fairly taken.*

1. The pressure of this point was evidently *felt* in the preparation of the answer. It is there said that the amount endorsed on the writ as that for which bail was to be taken was fixed upon "*to avoid all appearance of hard dealing*" (p. 26).

2. The same necessity was evidently felt in the giving of the appellees' testimony. It was apparently thought by them that it was quite unsafe to trust to the language only of

the bond, but that it was necessary to be shown *aliunde* that it was understood that security for a debt was to be given.

3. A case presenting strong resemblances arose in New Jersey. An order had been made discharging a *ne exeat* on the giving of bond by the defendant which, according to the terms of the order, would require him to hold himself amenable to the process of the Court. The bond actually executed was in different language; and the plaintiff contended that it made the sureties answerable for the amount found to be due, and he asked permission of the Court to prosecute it to that end. But the Court refused on the ground that the bond which the sureties supposed they were signing and which they had the right to suppose they were signing, was of a different character, and therefore that liberty ought not to be given by the Court to use the bond for a purpose other than the one intended.

Wauters *vs.* Van Vorst, 28 N. J. Eq., 103.

Eleventh Point.—Some circumstances supposed by the appellees to strengthen their view should be noticed.

1. On the occasion of a motion for the removal

of the suit to the U. S. Circuit Court it was argued, as the witnesses for the appellees testified, by the counsel for the appellees, that the cause should not be removed for the reason that the bond was of a peculiar character and would not survive removal, and that Durant's counsel, one of whom was Governor Van Zandt, did not *then* claim that they were bail bonds (Record, p. 45). It is enough to say that Mr. Griswold was not present, that Governor Van Zand was not counsel for Mr. Griswold, and his admissions whether by speech or silence could not affect the latter; and, moreover, if designed to affect Governor Van Zandt's subsequent testimony, the circumstances should have beeen called to his notice, on cross-examination, that he might explain the supposed inconsisteney, if any there were.

2. Some quotations from a brief filed in the *ne exeat* suit by Messrs. Honey, Van Zandt & Payne, counsel for Durant, not Griswold, are given (pp. 49 and 50,) apparently for the purpose of showing that these gentlemen then supposed the bond to have been a security for the debt. This testimony is subject to the same criticism. But it really shows the opposite. It shows that in the opinion of these gentlemen a bond *in the nature of a bail bond* was substituted in place of the bond which ought to have been given. It shows an impression on their part that the proper bond to have been *substituted for the writ* upon

3. But why should a Court of Equity, or even a Court of Law, *ever* allow a contract to be enforced which grew out of a *mistake*, even though it affected but one of the parties, and the other was not guilty of fraud? The reasons are, mainly, two; *first*, if it were generally allowed to a party to a contract to allege a mistake, it would be in many instances *falsely* asserted; and, *second*, in many instances the other party would have *acted* on the assumption that there was no mistake, and would be unjustly subjected to disappointment and loss for an error with which he was in no manner chargeable.

4. Hence, when there is *no other agreement* than the one asserted to be founded in mistake, such mistake cannot be set up against the enforcement of the contract, unless it was *mutual;* in which case, of course, it ought not to be enforced, for, confessedly, the minds of the parties never really met; or unless it was *brought about* by the party seeking to enforce it, in which case it is a *fraud*, which equity always relieves against. The general rule not to permit a written contract to be set aside or varied by parol evidence rests upon the same reasons of justice and policy.

5. But in those cases where a bond, conveyance

or other instrument is given, *not as containing the terms of the contract*, but as being something which by the terms of some *pre-existing* agreement, was to be given, different considerations come into view. In such cases the *pre-existing* agreement, whether oral or written, is really the *only* agreement between the parties. The instrument given under, and in supposed accordance with it, is something *done* in performance of the agreement — quite a different thing. If, by some mistake, this is not what was agreed upon, it is no violation of the rule forbidding parol evidence, to give evidence to show it.

And here, where the mistake is mutual, of course the agreement cannot be enforced; but where it is not mutual, but upon one side, the only question upon the point whether the instrument should have effect should be this, namely: *is the party entitled in equity to hold the advantage he has gained?* The real reason why a party who *brought about* the mistake cannot enforce the instrument is that that he cannot *in equity* hold the advantage, because he has been guilty of a fraud; but if, for any other reason, his equity to hold it were taken away, the consequence would be the same. Courts of equity base the relief which they furnish in both case upon the ground of *fraud;* but the fraud is very different in the two cases, being actual in one, and presumed in the other.

"If the mistake of law is not pure and "simple, but is induced or accompanied by

Fourteenth Point. It may be argued that the Supreme Court of Rhode Island had a proper supervision over its own proceedings and was the proper tribunal to be appealed to set aside this bond, and that this might have been done even on motion. Perhaps it might, but motions are not adequate instrumentalities for the full examination of questions of fact. But, however this may be, the original jurisdiction of equity is not ousted or affected by failure to make a summary application.

Fifteenth Point. This discussion has been a long one. It has has been designed to be minute. But it takes a few words only to describe the real nature of the case. The appellees brought a suit in equity and procured a *ne exeat*. That proceeding is really designed only to obtain security that the defendant shall be present in the jurisdiction so as to be amenable to final process. They arrested their defendant, and while he was under arrest this appellant, a stranger to the prisoner, moved only by the impulses of humanity, comes for the purpose of becoming bail for his appearance. At that interview the lawyers for the plaintiff in this suit, two in number, presumably familiar with the law under which their writ was procured, *take a bond from this stranger to pay the debt*. The latter had no counsel, and the only other lawyer present was that of the prisoner, who

was confessedly ignorant of the practice, and whose *interest* was solely to get his client released. Four witnesses against two swear that the only bond which was at the time agreed to be given was an ordinary bond to secure appearance, and that nothing was said about any issuing of a bond to secure any debt. And even these two witnesses, while testifying that a bond of the latter nature was to be given and its nature explained, state this in general terms only and give no conversation or language of that character.

It is safe to say that a court of equity has never before sustained such an instrument taken from a *surety* under such circumstances.

Sixteenth Point.—The true principles which govern this controversy would govern it all the same, if we were to adopt the rule applied by the Court below, namely, that it was incumbent upon the appellant to prove the mistake by the clearest evidence. These principles are that the appellees cannot hold this extraordinary bond given under such circumstances unless it *clearly appears* that the appellant well understood the nature and effect of the instrument. The utmost which the appellees can assert, and all indeed which the court below based its opinion upon, is that although there are four witnesses testifying to the effect that it was understood to be a bond for appearance only against two asserting the contrary, yet that

there *remains a doubt* as to whether the appellant did understand it to be a bond for appearance only. *This is the precise case in which the bond should not be enforced.* To render it valid it must appear clearly that its real nature was understood by the appellant when he executed it.

1. The nature of the error into which the learned Court below fell is fully manifested by the proposition upon which it bases its decision, and the authority referred to for that proposition (Record p. 61). In the case referred to by the Court (Hearne *vs.* Mar. Ins. Co., 20 Wall, 488) the holders of a marine policy of insurance sought to recover a loss. Confessedly under the terms of the policy as it was issued the loss was not recoverable. They alleged an agreement to insure which *would* have covered the loss, and that there was a *mistake* in drawing up the policy, and sought to have the policy *reformed*, so that it could be made the means of enforcing a recovery. There was no peculiarity in the *situation*, nothing in the nature of an attempt to enforce an unusual liability, indeed nothing but the ordinary case where a party seeks to have a written instrument reformed so as to correspond to a prior alleged agreement, and so that he can then make it a basis for recovery. Nothing can be clearer than the propriety of the rule in such a case that the complainant must affirmatively es-

tablish his case by the clearest evidence. It is upon such a rule drawn from such an authority, and applicable alone to such cases, that the Court below has determined a case of a totally different character.

There is an absolute *contrast* between these two classes of cases. In the one class the Court *denies* relief because there is doubt. In the other it *grants* relief because there is doubt. In the one case—that where there is no *unusual situation*—it is the business of the plaintiff seeking to enforce the obligation to establish his allegations to the entire satisfaction of the Court, suffering no doubt to remain; in the other, that where the *situation* is special and unusual in the respects hereinbefore indicated, when the plaintiff, who seeks to annul the obligation, has shown its unusual character and given evidence tending to show that the instrument exacted was not clearly understood—in other words, when nothing *more than a doubt* has been shown—it calls upon the defendant *to remove that doubt*; and this, too, by the clearest evidence.

Seventeenth Point.—That view of the facts which the appellees themselves insisted upon entitles the appellant the relief sought by him.

1. That Durant was under arrest under process

which called for nothing more than ordinary bail, and that Griswold went to the jail with the expectation of becoming ordinary bail and nothing more, is undisputed; that Durant declared his inability to give the sort of bail called for by the writ, and stated as the ground of his inability that he could not remain within the State, is what the appellees assert; that their counsel then suggested to him that he might move to discharge the writ (a proceeding upon which security can be given, not forfeited by departure, nor requiring anything more than the production of the prisoner's body) on the following Monday, and that Durant declared that he could not remain in Rhode Island even during Monday is also asserted by them. Durant, therefore, was seen by Hazard's counsel to be under the belief that he could not give the ordinary *ne exeat* bond for the reason that he must and would, even if such bond were given, depart from the State. Whether this belief was founded upon the impression that if he gave such a bond and then departed from the State he would incur the hazard of some form of punishment, or would simply forfeit his bond and thus render his sureties absolutely liable for the amount, does not appear; but in either case, he was under an erroneous conviction, and must have been observed by Hazard's counsel to be under that conviction. Under these circumstances they suggest to him, as they assert, the execution of such a bond as that actually taken. Of

course, they must be understood as having suggested this as something *less onerous* than the *ne exeat* bond—something which he could give and ask sureties for, not involving him or them in the perils which he apprehended. This form of bond, as Hazard's witnesses assert, Durant and Griswold, without complaint or hesitation, agreed to give, and afterwards did give. All the foregoing *facts* the appellees admit to be true.

Upon this case it stands clear that Durant was under a mistake, and was perceived by Hazard's counsel to be under a mistake. He supposed either that the *ne exeat* bonds would or might, should he depart from the State, draw upon him some punishment, or involve his sureties in an absolute liability. In either particular he was mistaken, and Hazard's counsel *knew* he was mistaken. The assumption that he did not know it supposes that all hands were alike involved in mutual error, which would surely invalidate the bond. *Knowing this error they took advantage of it, by suggesting, and gaining acquiesence in the suggestion of a bond giving Hazard an absolute security for his debt!* Nor does the case stop here. In suggesting this latter bond, they, of course, suggested it as something *less onerous and less hazardous* than the *ne exeat* bond; to give which Durant had declared his inability. Nothing can rescue this conduct from the charge of *false representation.*

Upon the above case, which is, as to its *facts*, that of the appellees themeslves, we

take it that the following propositions are self evident.

(1) That the bond is void *at law*.

(2) That equity will cancel it or enjoin any prosecution of it, *unless* the *taker* of the bond establishes by the clearest evidence not only that he corrected the mistake which *he* saw the party was under, but also that the maker of, and sureties on, the bond *well* understood its nature and character when they executed.

It is not pretended that the mistake was corrected. It is pretended that the nature and effect of the bond were explained. But this is only *pretended*. It is not *proved*. To prove this it was necessary to give the substance of the language in which the explanation was made in order that the Court may know whether it was an explanation or not. To simply say in general terms that the bond was "fully explained" is to no purpose. If these witnesses had any remembrance that it was explained, they must have had some remembrance of the language in which it was done. If they have no remembrance of any language, they have no remembrance of any explanation. Doubtless they *believed* that they had explained it, but a long time had elapsed, and what one wishes were true is apt to seem true. Nor was the burden cast upon the appellant to *cross-examine*. The burden was on the appellees to *satisfy* the Court by the *clearest* evidence that a full explanation was made. No Court pays

attention to such general statements. They *satisfy* no intelligent mind.

These witnesses themselves proved that they did not explain it; for one of them proved that, two months afterwards, he found Mr. Griswold under the complete delusion that he had signed only an ordinary bail-bond.

The above case stands on the plaintiff's showing. But when four witnesses against two testify that there was no such explanation what hesitation can there be?

Lastly.—The decree appealed from should be reversed and the cause remanded with instructions to enter a decree enjoining any proceedings to enforce the bond, or to collect or satisfy any judgment in the suits at law mentioned in the bill with costs

JAMES C. CARTER,
Of Counsel for Appellant.

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Supreme Court of the United States.

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No. .—OCTOBER TERM, 1890.

JOHN N. A. GRISWOLD, Appellant,

v.

ROWLAND G. HAZARD ET ALS.

BRIEF OF RESPONDENTS AND APPELLEES.

Supreme Court of the United States.

No. .—OCTOBER TERM, 1890.

JOHN N. A. GRISWOLD, *Appellant*,

v.

ROWLAND G. HAZARD ET ALS.

BRIEF OF RESPONDENTS AND APPELLEES.

STATEMENT.

This is a bill in equity brought by Griswold in the United States Circuit Court, District of Rhode Island, to reform or cancel a bond signed by Thomas C. Durant as principal, and Griswold, the appellant, and S. D. Bradford as sureties, and given to the respondents under the following circumstances:

The respondents, R. G. Hazard and others, brought a suit in equity in the Supreme Court of the State of Rhode Island against said Durant and others. Upon the filing of that bill, the Court granted a writ of *ne exeat regno*. Upon this writ Durant was arrested on Saturday, August 22, 1868 (the day of its date), and committed to jail. In the evening of that day the following parties met at the jail, at Durant's request, with a view of taking measures for his release from custody; namely, C. C. Van Zandt, his counsel, Griswold, one Gray, a friend of Durant, Bradford, and Judge C. S. Bradley and F. B. Peckham, Jr., Esq., the last two being the counsel for said Hazard and others. Durant was unwilling to give the bail bond required by the writ, because, as he stated, it was imperatively necessary that he should leave the State and be in New York on the next Monday. Some conversation took place (to be hereafter more fully referred to), when it was agreed that the parties should meet at a very early hour on Monday morning, when a bond should be given by said Durant, with Griswold and Bradford as sureties, and

in the mean time Durant was permitted to go at large upon his personal promise, and that of said proposed sureties, that he would appear and give a bond at the time stated. Immediately after midnight of Sunday the parties met, and the bond in question was given. The plaintiff claims that the bond which he signed was of different tenor and effect from that which he agreed to sign, and that he was led to sign it through fraud or mistake.

The answer of the defendants sets forth fully in response to the bill all the circumstances under which said bond was given, and denies each and every charge of fraud, fraudulent representation, concealment or mistake charged in the bill.

Upon hearing, the bill was dismissed and the complainant appealed. The opinion of the Court (Colt and Carpenter, JJ.) is in the Record, p. 58.

The bill apparently proceeds upon two grounds: first, that the signature of the plaintiff was procured to the bond by fraudulent representations and concealment — one or both; and secondly, that by mistake the bond as drawn and signed was of a different legal tenor and effect to what the parties supposed and intended it to be.

NO FRAUD.

The bill (Record, p. 7, last paragraph) sums up the alleged fraud on which the plaintiff relies, in these words:

"Your orator therefore submits that the bond in question was obtained from him by the fraud of the defendants, which fraud consists of the facts following: That said defendant sued out a writ of *ne exeat* on the allegation that the said Durant was soon to depart from the State, which allegation was sustained only by the fact that the said Durant contemplated coming to the State; that the presentation of the bond in question by the sheriff to your orator for his signature as an indispensable prerequisite to the discharge of the said Durant from imprisonment was a fraudulent violation of the instructions of the writ and of the law; that a private agreement was entered into by the said defendants with the said Durant which alone could validate the bond, and that important fact, as well as its legal effect, was fraudulently concealed from your orator; that while the writ commanded the sheriff distinctly and plainly under his hand to return that he had taken the agreement from Durant, the said sheriff (either at his own neglect or at the instigation of the defendants) concealed the fact that a private agreement had been made by the parties and a bond given, as claimed, for the payment of the debt; that the said defendants, in order that the said bond might not be invalid because of their failure to

carry out their part of the agreement, without the knowledge or consent of your orator, discharged the said writ, so that your orator might not be able to move the said court to take such action as would secure to said defendants all the rights the said writ conferred on them, and thus no breach of the condition of the bond occur, but discharged the said writ, so that your orator's only relief should be the payment of the debt; that the defendants, while they knew that your orator thought he was only given 'bail' (the term used in said writ) for the appearance of the said Durant, concealing the truth as to fact and law, managed to obtain your orator's signature to a bond which it is claimed is, by virtue of the agreement, valid, and which is claimed to be a bond for the payment of the debt."

(1.) As to the first allegation, namely, "that said defendants sued out a writ of *ne exeat* on the allegation that the said Durant was soon to depart from the State, which allegation was sustained only by the fact that the said Durant contemplated coming to the State," the answers to it are manifold. The granting of said writ, and the sufficiency of the evidence for granting it, were matters exclusively within the cognizance and control of the Supreme Court of Rhode Island, and it is utterly incompetent for the plaintiff by this bill to call in question or review the validity of this action of that court. Moreover, the release of Durant from the writ having been procured by giving the bond in question, the plaintiff (as well as said Durant) is estopped from calling in question the validity of said writ. Again, the testimony introduced by the plaintiff himself fully substantiates the fact that Durant was in the State for a temporary purpose, and intended to leave it, and so fully justifies, if such justification were necessary, the action of the court in granting the writ.

(2.) The second allegation of fraud is, "that the presentation of the bond in question by the sheriff to your orator for his signature, as an indispensable prerequisite to the discharge of the said Durant from imprisonment, was a fraudulent violation of the instructions of the writ and of the law."

A complete answer to this allegation and imputation upon the sheriff is, that by the concurrent testimony both of the plaintiff and of the defendants, the taking of the bond which the writ required the sheriff to take was waived at the special request of Durant, and the bond in suit was substituted therefor; that consequently

the sheriff neither presented to nor required any bond of Durant whatever.

(3.) The third allegation of fraud is,

"That a private agreement was entered into by the said defendants with the said Durant, which alone could validate the bond, and that important fact, as well as its legal effect, was fraudulently concealed from your orator; that while the writ commanded the sheriff distinctly and plainly under his hand to return that he had taken the agreement (?) from Durant, the said sheriff (either by his own neglect, or at the instigation of the defendants) concealed the fact that a private agreement had been made by the parties, and a bond given, as claimed, for the payment of the debt; that the said defendants, in order that the said bond might not be invalid because of their failure to carry out their part of the agreement, without the knowledge or consent of your orator, discharged the said writ, so that your orator might not be able to move the said court to take such action as would secure to said defendants all the rights the said writ conferred on them, and thus no breach of the condition of the bond occur, but discharged the said writ, so that your orator's only relief should be the payment of the debt."

It is a little difficult to understand what the plaintiff means by this allegation, and so far as it sets forth any fact, it is contradicted by the concurrent testimony in the case. No "private agreement" whatever was entered into between the defendants and Durant; the plaintiff's own testimony shows that their relations to each other at this time were most hostile, and that whatever occurred with reference to this bond took place in the presence of all the parties heretofore named, including the plaintiff. *At the same time that the bond in question was signed*, an agreement of counsel was signed, which is on p. 5 of the record, for the very purpose of carrying out the very object for giving any bond, namely, the discharge of the writ of *ne exeat*. The signing of this agreement by counsel had no effect whatever, either upon the validity or invalidity of the bond in question, and the allegations in the bill in that particular are meaningless. The uncontradicted testimony of F. B. Peckham, Jr., upon this point is as follows (Record, p. 44):

"Besides these bonds, it was also agreed that the respective counsel should sign an agreement that upon the bonds being executed the writs of *ne exeat* should be absolutely discharged. . . . I prepared the papers and had them lying upon my table when we met, pursuant to the arrangement. . . . The papers were signed without any objection or discussion at that time."

This fraudulent "private agreement" was signed accordingly by Mr. Van Zandt, the counsel of Durant and the principal witness in behalf of the present plaintiff.

(4.) The remaining allegation of fraud is,

"That the defendants, while they knew that your orator thought he was only giving 'bail' (the term used in said writ) for the appearance of the said Durant, concealing the truth as to fact and law, managed to obtain your orator's signature to a bond which it is claimed is, by virtue of the agreement, valid, and which is claimed to be a bond for the payment of the debt."

Our answers to this allegation are as follows:

First. The allegation itself is utterly vague, and wholly insufficient in law to require the defendants to make any answer thereto. There is no averment whatever of what was concealed by the defendants, or who, or by what means, they "managed" to obtain the plaintiff's signature to said bond.

Wallingford *v.* Mutual Society, 5 App. Cas. 685, 697, 701, 709.

Opinion of Mr. Justice Gray annexed to brief in No. 343, and cases there cited.

Second. It is not claimed, as stated in this allegation, that the bond in question is, "by virtue of the agreement, valid." As already said, the validity of the bond does not depend in the slightest degree upon that agreement, although the existence of such an agreement may be of great weight in determining the question, what kind of a bond the parties really intended and understood they were to give and take.

Third. There is no foundation whatever in fact for the allegation that the defendants knew or had any reason to suppose that the plaintiff thought he was only giving "bail" for the appearance of said Durant, or that they were guilty of any concealment of any matter of fact or of law whatever, or that the defendants ever requested, or did any act, or made or concealed any statement, with the view of inducing the plaintiff to sign said bond, or that the plaintiff was in any degree influenced by anything that the defendants did or said, or failed to say, in signing said bond as surety for Durant.

TESTIMONY CONSIDERED.

This leads us to a consideration of the testimony in reference to what took place at the two interviews between all the parties in question. The witnesses introduced by the complainant are, the complainant, Henry W. Gray, who described himself as a nephew of Griswold and a friend of Durant, and Charles C. Van Zandt, the counsel of Durant. Gray's testimony, so far as competent at all upon this issue, is contained in his answers to ints. 6, 7 and 10, Record, pp. 30, 31:

"*Int.* 6. Where was the said Durant when you took the said Griswold to him?

"*Ans.* In jail in Newport.

"*Int.* 7. State all that occurred there — who was present, what was said and done in the hearing of said Griswold.

"*Ans.* Durant, S. Dexter Bradford, Griswold, and the sheriff or jailer, some lawyer, I think, and myself. Mr. Griswold was asked to sign the bond that Durant might be released, and he agreed to do so."

"*Int.* 10. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause of either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

"*Ans.* The whole idea that I had was that a bail bond was to be given to replace him within the jurisdiction of the court when wanted, the same as he was when released from jail on Saturday night."

This answer of Gray as to what his idea was as to the bond, is clearly incompetent. His testimony contains no statement whatever as to the character of the bond which was the subject of discussion.

Durant. All the testimony of Durant upon this point is found in his answers to ints. 5 and 12, Record, p. 33:

"*Ans.* 5. Mr. Griswold became surety for me on or about the twenty-second day of August, 1858, and did so at the request of my friend, Henry W. Gray, to release me from jail. He came to the jail with Mr. Gray about eleven and a half o'clock on a Saturday night, and Mr. Griswold told Mr. Hazard's lawyer that if they would release me he would sign a bond for my appearance. . . . At the appointed hour, early Monday, he signed a bond for my appearance at court, as I understood. The conversation that took place on the Saturday night was general, and the character of the bond was not discussed, to my recollection, but merely spoken of as a bond for my appearance."

"*Int.* 12. Give the names of all persons present at the time, and state all that was said and done in the hearing of the said Griswold.

"*Ans.* There were Mr. Bradley, Mr. Peckham, I believe Mr. Sheffield, Mr. Van Zandt, Mr. Br[illegible]ord, Mr. Griswold and myself. The conversation was general, more particularly about the arrest, and that I was to sign a bond for my appearance at court. The bond was already prepared and in the hands of Mr. Hazard's attorneys. I asked my lawyer, Mr. Van Zandt, if the document was all right, and he said yes; whereupon I signed it and Mr. Griswold signed it. The whole time was but a few minutes. I cannot recall any special conversation that took place."

Griswold. The testimony of Griswold bearing upon this point is contained in his answers to ints. 9, 10, 11 and 12, and to cross-ints. 1 and 2: —

"*Ans.* 9. . . . Deeming it [Durant's arrest] an outrageous breach of the hospitalities of the place, and to gratify my nephew, I went down to the jail and there found Durant. Shortly afterwards Mr. Peckham, Hazard's counsel, and, I think, Mr. Bradley, appeared. It being then at half past eleven, and too late to draw a bond which would be legal, I told them if they would release Durant I would meet them at Mr. Peckham's office on Monday morning early, and sign a bond for his appearance when wanted. I had no conversation with Durant other than that I would sign a bond for his appearance. All the persons that I recollect were Durant, Peckham, I think Bradley and Sheffield, and the sheriff.

"*Int.* 10. Did you then sign any bond? If yes, what kind of a bond did you suppose it to be?

"*Ans.* I did not sign any bond on this Saturday night, but on Monday morning, at about 12.30 A. M., I went to Mr. Peckham's office and signed what I supposed was a bail bond for Durant's appearance when wanted.

"*Int.* 11. What were your reasons for being willing to become surety?

"*Ans.* My reasons were to gratify my nephew, H. W. Gray, and because I thought it was a hardship that a visitor in Newport should be thus arrested and detained from his business and family. I did not understand, nor did any one explain to me, that the bond I was to sign was anything but a bond for Durant's appearance when wanted. Had it been stated that the bond contained any obligation on my part to pay any sum of money, except on Durant's failure to appear and place himself in the same position he then was when I released him from jail, I should have declined to sign it.

"*Int.* 12. Did you believe that the said bond was a bond conditioned for the payment by you of a sum of money in case the said Durant did not pay it?

"*Ans.* I did not believe it, and would not have signed any such bond."

"*Cross-Int.* 1. (Record, p. 38.) Did you not confer with Charles C. Van Zandt, counsel for said Durant, before or at or about the time of your signing

said bond? Did you not then ask said counsel, and did he not then tell you, the nature thereof and the liability it created or imposed?

"*Ans.* I did not confer with Charles C. Van Zandt, nor did I ask nor did he tell me the liability the bond created or imposed.

"*Cross-Int.* 2. Did you not read said bond or the condition thereof, or hear it read? When and where was it so read? By whom, if any one, was it read to you? Give the names of all persons present at such reading.

"*Ans.* It was not read to me by anybody. *I read it, and noticed the terms 'abide by and perform the decrees of the court.'* In the absence of any explanation, I inferred that it meant that Durant should appear and render himself subject to the processes of the court. Had the bond read, pay any decree of the court, I should have understood it differently, and refused to sign it. At the time I read the bond, Peckham, Bradley, Durant, Gray, Sheffield and Bradford were present."

The last clause of int. 10 and ints. 11 and 12 were duly objected to as incompetent, and the testimony given in response thereto by Griswold as to his suppositions, motives, or what he would or would not have done if he had believed the bond was a bond for the payment of money in case Durant did not pay it, is clearly inadmissible and cannot affect the defendants, as there is no pretence in his testimony, or in any testimony introduced in his behalf, that his suppositions, beliefs or understandings in reference to the character of the bond which he signed were communicated by him to the defendants or their counsel, or that those suppositions, beliefs or understandings were induced or brought about by anything said or done by the defendants or their counsel.

Van Zandt, Record, pp. 40, 41. The testimony of Van Zandt bearing upon this question is contained in his answers to the 6th, 7th, 8th, and 11th interrogatories.

"*Int.* 6. State what was said and done in the presence of J. N. A. Griswold in relation to said bond, and state who were present.

"*Ans.* . . . Mr. John N. A. Griswold and Samuel Dexter Bradford were present, Ex-Judge Charles S. Bradley, and, I believe, Mr. Francis B. Peckham, Jr. . . . I was shown a writ of *ne exeat*, upon which Thomas C. Durant was then held in custody. It was agreed, since it was about midnight on Saturday night, that Thomas C. Durant should be allowed to depart the jail, he, John N. A. Griswold, and Samel Dexter Bradford verbally agreeing that Durant would personally appear on Monday morning and give a bond, as I understood it, to appear and answer to the writ. The conversation was brief, as the hour was late, and my recollection is that Durant agreed to appear at the office of Francis B. Peckham, Jr., Esq., on Monday morning, at nine o'clock. . . .

(Speaking of the second interview) Mr. John N. A. Griswold and Mr. Samuel Dexter Bradford, Judge Bradley, Francis B. Peckham, Jr., and others were present. I do not recall the names of the others. A bond, prepared by Messrs. Peckham and Bradley, was handed to me as counsel for Mr. Durant; there was some little discussion as to whether it should be made to the sheriff of Newport county or to the complainants in the then suit. Judge Bradley preferred the latter, and it was so done. I told Mr. Durant that, in my opinion, it was a proper bond to secure his appearance in the suit, and the bond was then executed.

"*Int.* 7. In what capacity were Judge Bradley and Mr. Peckham present?

"*Ans.* As counsel of record for the complainants in the pending suit, in which the writ of *ne exeat* was issued.

"*Int.* 8. State whether anything was said in your presence or, to your knowledge, in the presence of Mr. Griswold, by Judge Bradley or Mr. Peckham, or any other person, as to the construction or effect of said bond; and if so, state what was said.

"*Ans.* I heard nothing said by Judge Bradley or Mr. Peckham, except what I have already stated. I myself told Mr. Durant that, in my opinion, the instrument was in effect a bail bond."

"*Int.* 11. Was Mr. Griswold present when you told Durant that, in your opinion, it was in effect a bail bond?

"*Ans.* He was present, but I do not know whether he heard the conversation."

The answers of Van Zandt to ints. 8 and 11, so far as they contain a statement of what the witness told Durant, not in the hearing of the defendants or of their counsel, are clearly incompetent, and were duly objected to. And again, whatever Van Zandt might have told his client Durant, as to the character of the bond, can have no effect in this case, as the plaintiff expressly swears that no such statement was made to *him* or in his hearing. (Answer to cross-int. 1, Record, p. 38.)

Before proceeding to refer to the defendants' testimony relating to the circumstances under which the bond in question was given, the defendants confidently submit that all of the testimony introduced by the plaintiff, as it stands, not only utterly fails to make out any fraud, either by misrepresentation or concealment, on the part of the defendants or their counsel, in obtaining said bond, but also that it does show beyond a reasonable doubt, —

First. That no statements whatever were made by defendants' counsel, Bradley and Peckham, to the effect that the bond which

they presented for signature was merely a "bail" bond; or that they made any statement whatever which could have led the plaintiff to believe that it was merely a bail bond; or, if his own testimony is true, that they made any statement whatever in reference to the character of the bond.

Second. That at the most, the plaintiff Griswold, Van Zandt and his other witnesses "understood" that the bond in question was a bail bond — an understanding not brought about by the defendants or their counsel, *nor an understanding communicated to the defendants or their counsel by any of the parties concerned.*

Third. On the contrary, it affirmatively appears from the testimony of Griswold himself that he carefully read the bond, observed its peculiar terms, but refrained from asking any explanation thereof, either from the defendants' counsel or from Van Zandt, the counsel of Durant.

Fourth. As defendants' counsel, Bradley and Peckham, had no intimation whatever from Griswold, Van Zandt, or any one else, that a different meaning was attached to the bond from that which its language plainly indicated, the allegation of fraudulent concealment by the defendants is most gratuitous and baseless.

Moreover, the defendants owed no duty to the plaintiff. They merely asked for the bond which the writ called for. ("Judge Bradley said: That is a simple matter. Let him give the bond called for by the writ." Peckham R., p. 43, f. 54.) Durant and his friends were asking a favor from the defendants which they were willing to grant, namely, to save Durant the great inconvenience to which he would be subjected by giving the bond which the writ called for (which would confine him to the State of Rhode Island), provided another satisfactory bond was given to them. The defendants made no request whatever for such a bond, still less that the plaintiff Griswold should become a surety thereof. They owed, therefore, no duty to the plaintiff which called upon them to make any statements to him whatever. There can be no concealment, in view of the law, unless a duty to disclose exists. So long as the defendants and their counsel refrained from doing or saying anything to mislead the plaintiff, their entire duty would have been done; but beyond this, they had no reason whatever to suppose

that the plaintiff was acting under the slightest misapprehension. On the other hand, it was the duty of Durant and his counsel, in all fairness to Durant's surety, to make known to him everything material for him to know in determining whether he would become a surety or not; and if there was any failure in that respect, it was the fault of Durant, or his counsel Van Zandt, which cannot in the least degree prejudice the rights of the defendants.

TESTIMONY OF DEFENDANTS.

The testimony introduced by the defendants, however, entirely disposes of these charges of fraud, concealment and mistake, and gives a full and detailed account of all that transpired on the occasions referred to. The defendants personally were not present at the interviews in question, and took no part therein; they were represented entirely by their counsel, Ex-Judge Bradley and F. B. Peckham, Jr., Esq.

Peckham. The testimony of Mr. Peckham upon this point is found in his answers to ints. 1 and 2 and cross-ints. 1 and 2, Record, pp. 42, 43, 46, which are as follows:

"*Int.* 17. Did you, as counsel for complainants in the suit in equity, Isaac Hazard and others *v.* Thomas C. Durant and others, instituted in the Supreme Court of Rhode Island in August, 1868, have any knowledge of the bond which is the subject matter of the present suit? If so, state fully what was said and done at the execution of said bond, and preparatory thereto.

"*Ans.* I was one of the complainant's counsel in the case; Judge Bradley was the other. We applied for a writ of *ne exeat* in Newport on the 22d of August, 1868, about noon. The writ was issued about one o'clock, and handed to Deputy Sheriff Lake at that hour, with instructions. He might have been the sheriff, but I think he was deputy sheriff. About three o'clock he returned and went down to the wharves. I mean he returned to the court house, and from there went down to the wharves of the harbor. Continuous watch was kept up there by him or some assistant of his until late in the evening. Then a yacht came into the harbor from up the bay, and Durant, with three or four ladies, was rowed ashore from the yacht to Commercial Wharf. He was arrested then and there at about eleven o'clock. He rode off in the carriage with Mr. Lake, the officer. I followed on foot to the sheriff's office. I found there only some person in charge of the office. After a little talk with him I went away for Judge Bradley. I found him, and started with him for the jail. On the way to the jail I stopped for a few minutes. Judge Bradley went on without me. When I got to the jail I found there Judge Bradley, who had

only preceded me there by a minute or two; Mr. Durant, Charles C. Van Zandt, his counsel; Mr. Griswold, Dexter Bradford, and a stranger, who was, I presume, Mr. Gray. Mr. Van Zandt and Judge Bradley were already talking about the release of Mr. Durant from custody. Judge Bradley said, 'That is a simple matter. Let him give the bond called for by the writ.' The nature of that bond was briefly explained. Mr. Durant said that it was out of the question for him to give it; that he couldn't remain any longer in Rhode Island: that his presence was absolutely demanded outside of the State and forthwith, and that he must leave here Monday morning. It was suggested that he might file his answer and apply for the discharge of the writ immediately, but he said, 'I know what proceedings in court are, and I can't remain here at all.' It was then proposed that he should give a bond in the same amount marked in the two writs in the two cases, conditioned to abide and perform whatever decrees the court might make against him in those suits. The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to pay money in case Durant should not perform any decree made by the court, was commented on by Mr. Van Zandt and Mr. Durant. During all this interview Judge Bradley did all the talking for the complainants, and Mr. Van Zandt and Mr. Durant spoke about equally for their side. No one else said anything that I remember, with one exception. The sureties were near enough to hear all that was said, and couldn't help hearing if they paid any attention, but they took no part in the discussion. Mr. Gray — if it was Mr. Gray — did speak pretty warmly about the arrest, and said that the suits were blackmailing suits set on foot by Rowland G. Hazard. He used some strong language about Mr. Hazard, and while the form of this bond which is now in suit was being debated he broke in and said that there never would be any decree against Mr. Durant; that Durant would never have anything to pay; that the complainants would have to pay Durant damages for malicious prosecution, and that that was all the paying there would be about it. Mr. Durant assented to that, and signified his approval of that way of stating the case. Mr. Van Zandt having conferred with Mr. Durant, and those two having conferred with the sureties,— I mean Mr. Griswold and Mr. Bradford, — Mr. Van Zandt then announced that they would give the bonds proposed. As it was then very late, it was further agreed that all should meet at my office on the following Monday morning, soon after midnight, and execute the papers. Besides these bonds, it was also agreed that the respective counsel should sign an agreement that upon the bonds being executed the writs of *ne exeat* should be absolutely discharged. Just at the close of the interview Judge Bradley addressed himself to all present, saying that he wished to make sure that all understood the arrangement alike, and he stated that Mr. Durant was to give bonds, with Mr. Griswold and Mr. Bradford as sureties, in the sums marked in the writs, to abide and perform all the decrees of the court in the suit; that counsel should sign agreements for the discharge of the writs; that all should meet at my office soon after midnight Monday morning and

sign the papers; that in the mean time Mr. Durant would go free from custody upon his word of honor, and he appealed to the sureties, saying, 'We rely upon you, gentlemen, to see that he attends.' We then separated. I prepared the papers and had them lying upon my table when we met, pursuant to the arrangement. They were read. Mr. Griswold took an active part at this meeting, and, I think, read the papers for himself. The papers were signed without any objection or discussion at that time. Probably we were not together at my office more than ten minutes.

"*Int.* 2. Was it stated or claimed by any person in your presence, or to your knowledge, at or prior to the execution of said bond, that it was a bond for the appearance of said Durant only?

"*Ans.* No, sir."

"*Cross-Int.* 1. How much time was occupied by the interview which occurred on Saturday evening at the jail, to which you referred?

"*Ans.* I should think about half an hour. I should think rather less than more.

"*Cross-Int.* 2. Are you positive that Mr. Griswold was present and within hearing during the whole of that interview?

"*Ans.* Yes, sir; I feel very sure of it. I have no doubt of it."

Bradley. Judge Bradley's testimony upon this point is in his answers to ints. 1 and 2, Record, pp. 46, 47.

"*Ans.* I was one of the counsel with Mr. Peckham for the complainants in the Hazard-Durant suit. I was present at the time the arrangement was made for the giving of the bonds, and also when they were executed. I cannot recollect all the incidents of the transaction as vividly as does Mr. Peckham, whose deposition I have just heard. I remember the substance of the transaction. The persons present at the jail when it occurred were, on the part of the complainant, Mr. Peckham and myself; on the part of the defendant, Mr. Van Zant, his counsel, Mr. Durant, Mr. Griswold, and some other persons whom I do not distinctly remember. Considerable complaint was made by the friends of Mr. Durant, who was there, in regard to the proceedings, and that Mr. Hazard was in the wrong and would in time be prosecuted therefor. This was rather put aside, and, as Mr. Durant said that it was indispensable that he should leave the State on the following Monday, the question was, what he could do to discharge the suit, and it was proposed that he give a bond in the same amount as stated in the writ, with sureties, for which Mr. Griswold, and another person who was present, were thought to be sufficient for the performance of any decree which should be made; that it was to be a security. It was, according to the best of my recollection, understood by all parties, and that papers should be drawn containing the terms and provisions of such a bond and agreement, also to be reduced to writing, for the discharge of the order of the Court directing the issuing of the writ of *ne exeat*. It was the eve of Sunday, about twelve o'clock at night. The proper papers could not be

drawn so as to be executed before twelve o'clock. The midnight of Sunday night was proposed for their execution, so that Mr. Durant could leave early Monday morning. There was nothing said during that interview, to the best of my recollection and belief, by any one, conveying the idea that the complainants were to obtain from the defendant nothing but bail for his appearance. The mode of giving bail uniformly practised in this State, so far as I know, is to endorse the name of the bail in the writ. In this case, the terms of the bond were expressed, so as to exclude the idea that it was merely a bail for appearance, and to provide that it should be a bond to abide and perform the order of the Court. It was not the desire of any party that Mr. Durant should remain in custody over Sunday; it was agreed that Mr. Durant should go, and that his return to execute the papers rested only on the honor of himself and that of his friends, who appeared there for him. As the transaction was a peculiar one, and as some considerable feeling was expressed by Mr. Durant and his friends, and as it was to be left to a verbal agreement, it was thought proper at the close to state clearly what had been agreed upon in the hearing of all parties concerned, and it was then so stated by myself that a bond, signed by Mr. Durant and by the two sureties, who were there and were named by him, in the amount named in the writ, to abide by and perform all the decrees which should be made by the Court, should be drawn and executed, and that at the same time an agreement in writing should be signed by counsel for both sides for the discharge of the writ, and that the parties should meet at midnight of the following night, at the office of Mr. Peckham, for the examination and execution of such papers. The parties — that is, Mr. Durant, his two sureties, Mr. Van Zant, and Mr. Peckham and myself — met at Mr. Peckham's office at the time appointed, and, after a brief examination, the papers were executed without objection. While I cannot recall all the language or incidents of the interview, or much of it, the impression on my mind that the transaction was to operate as a security to the complainants to the extent of the sum named in the bond for their claim upon Durant, which should be established by judgment, is clear and strong.

"*Int.* 2. Was it stated or claimed by any person in your presence, or to your knowledge, at or prior to the execution of such bonds, that it was a bond for the appearance of said Durant only?

"*Ans.* It was not."

The testimony of these two witnesses, if true, clearly establishes the following points:

First. That at the outset at the interview of Saturday night, all that the defendants' counsel required of Durant was that he should give "the bond called for by the writ."

Second. That Durant was unwilling to do this, because he wished to leave the State.

Third. That it was thereupon proposed that he should give a bond conditioned "*to abide and perform* whatever decrees the court might make against him"; that the character of such a bond was discussed, and the fact that it would hold the principal and sureties liable to pay money in case Durant should not perform any decree of the court, was distinctly stated and understood.

Fourth. That at about the close of the interview of Saturday night, Judge Bradley, in the presence and hearing of all parties, reiterated the arrangement as he understood it, namely, that Durant was to give bond, with Griswold and Bradford as sureties, in the sum marked in the writ *to abide and perform* all the decrees of the court in the suit, and that counsel should sign an agreement for the discharge of the writ: and that to this statement there was no dissent.

Fifth. That in the mean time Mr. Peckham prepared the bond and the agreement precisely as had been agreed upon, and that early Monday morning the parties all again met, the bond was read, — certainly by Griswold, as he admits, — and was then signed.

Sixth. It therefore follows, that the signature of Griswold to said bond was not procured, or made by means of any false representation, concealment or mistake.

The testimony of Bradley and Peckham is distinct and positive. It is not to be suggested that they have sworn falsely; and it is equally inconceivable that they both, by a strange coincidence, should have imagined conversations to have taken place which never did take place.

Gray, Van Zandt and Griswold were called in rebuttal, but their testimony is simply a denial of any recollection of the conversations and events testified to by Bradley and Peckham, so far as those statements differed from the original testimony of said witnesses.

At the utmost, therefore, the plaintiff must rely upon the present "understanding," or the failure to recollect, of his witnesses, to overcome the clear, positive and distinct statements of Bradley and Peckham as to what actually did take place at these interviews.

CORROBORATION.

This testimony, moreover, is corroborated to a most satisfactory extent by all the probabilities and attendant circumstances of the case.

(1.) Inasmuch as Durant declined, or preferred not to give the bond called for by the writ, it was the imperative duty of the defendants' counsel, Bradley and Peckham, not to accept voluntarily any other bond than that which was given, namely, one to abide and perform, etc. If Durant had applied to the Court for the discharge of the writ, the Court might, and undoubtedly, in view of the circumstances of the case, would have required as a condition for such discharge that Durant should give the precise bond which he has given, or that he should deposit in court the sum marked in said writ.

The well-settled practice in such cases is thus stated in 3 Daniel, Ch. Pr. (1st Am. ed.) 1946:

"The court must discharge the writ upon the merits, whenever it appears, by the circumstances of the case, as disclosed by the affidavits on which it was granted and the answer of the defendant, either that the plaintiff has no case, or that the defendant is not going out of the jurisdiction, and this it will do either absolutely or conditionally, *i. e.*, upon the defendant's giving security *to abide and perform the decree of the court;* for which purpose it will refer it to the master to approve of the proper security. The court will also discharge a *ne exeat regno*, upon the defendant's paying into court the sum for which the writ is marked."

Griswold, Petitioner, 13 R. I. 125.
Hazard *v.* Durant, 9 R. I. 606, Potter, J.
Dick *v.* Swinton, 1 V. and B. 371.
Stewart *v.* Graham, 19 Ves. 312.

There was nothing in the circumstances of the case, or in the relation of the parties to each other, which would have justified, or even suggested to the counsel of Hazard *et als.* that they should accept any security of less value than that which they were justified in supposing the Court would require Durant to give.

(2.) The agreement of counsel in said case of Hazard *v.* Durant, which was signed by counsel at the same interview at which the bonds were signed, and as a part of the same transaction, namely,

by Peckham for Hazard *et als.*, and by Van Zandt for Durant *et als.*, makes it incredible to suppose that Van Zandt *at that time* did not clearly understand that the bond in question was a bond to abide and perform, etc., for as this agreement expressly provides, it was upon the giving of such a bond that the writ of *ne exeat* was to be discharged. His attention, therefore, must have been directed to the matter in question, not only as counsel for Durant in examining the bond itself, but also in this agreement which he was called upon to sign as the counsel of Durant. It cannot, therefore, be controverted successfully that the bond as drawn (whatever legal effect he may have attached to it) was in the precise terms agreed upon by all the parties in question.

(3.) Van Zandt's subsequent conduct as counsel in the case of Hazard *v.* Durant, in claiming that the bond in question was absolute security for the payment of the amount named therein, as a reason why other and additional security should not be given in that case, is wholly inconsistent with his present "understanding" and recollection, and shows conclusively that if he then acted in good faith, he understood and believed the bond to be just what we now claim it to be. The evidence upon this point is given by Peckham, in his answer to int. 4, Record, p. 45, and by Judge Bradley, in his answer to int. 4, Record, pp. 48, 49, 50. It is a most significant circumstance that although Van Zandt was recalled and testified after the above testimony was given, no question was asked of and no statement was made by him in reference to that matter.

(4.) In corroboration of Mr. Peckham's good faith and understanding as to the character of the bond is his interview with Griswold the last of October or first of November, 1868, as follows (Record, pp. 44, 45):

"*Int.* 3. Did you subsequently have any conversation with said Griswold, in which said bond or bonds were spoken of? If so, state when, where, and what was said on that subject.

"*Ans.* About the last of October or the first of November, 1868, — along that time, — I met Mr. Griswold on Thames Street, in Newport, near my office. He spoke of this bond as if it were a bail bond. I said, 'No; it is a bond upon which you may be liable to pay money. If, for example, the court should find a judgment against Durant for any sum of money and he did not pay it, you could be held for the amount named in these bonds.' He said,

from that which the law gave it; but this, as is fully settled, is a mistake of law, against which equity will give no relief.

Hunt *v.* Rousmainere, 1 Peters, 1, 15.
Upton, Assignee, *v.* Tribilcock, 91 U. S. 45.
U. S. *v.* Ames, 99 U. S. 35, 46.
Railroad Company *v.* Souther, 13 Wallace, 517, 524.
Hart *v.* Hart, L. R., 18 Ch. D, 670.
Gorham *v.* Child, 1 Brown, Ch. R. 92.
Allen *v.* Galloway, 30 Fed. R. 466.
Griswold, Petitioner, 13 R. I., 125, *126.*

And this is true, although such misunderstanding may have arisen from the representations of the other party.

Upton *v.* Tribilcock, *sup.*
Randall *v.* Ford, L. R. 2 Eq. 750, *754.*
Blackburn's Case, 8 De. G. McL. G. 177, *180.*

Fourth. Again, it would be most inequitable for the Court to change or cancel this bond upon such a suggestion of mistake, because the plaintiff, as he expressly admits in his own testimony, himself read the bond. Cross-int. 2, Record, p. 39:

"I read it [the bond], and noticed the terms 'abide by and perform the decrees of the court.' In the absence of any explanation, I inferred that it meant that Durant should appear and render himself subject to the processes of the court."

And in his bill (Record, p. 9) he alleges:

"Your orator, on his oath, saith that he acted on his own judgment, not doubting but that he was being dealt fairly with."

It thus appears that his attention was attracted to this phraseology, and preferring not to make any inquiry, he put upon it his own legal construction: and because he erred in that construction, he now seeks to deprive the respondents of the security which the bond was intended to give. The above cases are conclusive against him.

Fifth. Again, equity will never vary an instrument unless the mistake was mutual and common to both parties, or unless one of

the parties knew that the instrument was incorrectly drawn, and so was guilty of a fraud toward the other party.

Hearne *v.* Mar. Ins. Co., 20 Wall. 488, 490.
Germ. Am. Ins. Co. *v.* Davis, 131 Mass. 316.

Whenever the proof is clear that a mutual agreement has been understandingly made, *but in reducing it to writing some error has occurred by mistake*, so that the instrument as written does not conform to the agreement which it was intended to embody, equity will reform the instrument to conform to the actual agreement. Such were the cases of

Snell *v.* Insurance Co., 98 U. S. 85, 90.
Oliver *v.* Insurance Co., 2 Curtis, 277, 296.

The defendants do not desire to call in question, in the least degree, the doctrine of those cases.

It cannot be doubted in this case that unless Bradley and Peckman were both guilty of a gross fraud, now supported by as gross perjury, they understood that Durant was to give precisely the bond which was given, and that it meant precisely what the Supreme Court of Rhode Island have held it to mean, and they also supposed and believed that Durant and his sureties and their counsel attached the same legal meaning and effect to it. It would therefore be most inequitable and unjust, at the suggestion of one party, to change this bond so that it shall have an entirely different meaning and effect from what its terms plainly imported and from what they understood it had when it was given; especially when, as in this case, the party giving the bond has enjoyed his full share of the consideration, and the parties cannot be put *in statu quo*. To vary the bond as proposed is in effect to annul it (Durant being dead), and to deprive the respondents entirely of their security.

Sixth. It is established by a clear preponderance of testimony that in point of fact, Griswold could not have been under any misapprehension even as to the legal effect of the bond, *when he signed it*, for its nature had been clearly pointed out in his presence and hearing by Bradley and Peckham, and the fact "that the sureties would be liable to pay money in case Durant should not perform any decree

from that which the law gave it; but this, as is fully settled, is a mistake of law, against which equity will give no relief.

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made by the court was commented on by Mr. Van Zandt and Mr. Durant."

Peckham, ans. 1, Record, p. 43, fol. 54.
Bradley, ans. 1, Record, p. 47, fol. 60.

LACHES.

The laches of the plaintiff in setting up this alleged fraud and mistake is of itself a sufficient answer to the bill. It is proved beyond controversy that as early as October or November, 1868, the character of this bond, as distinguished from its being merely a bail bond, was called to his attention by Mr. Peckham. Peckham, int. 3, and answer, Record, p. 44:

"*Int.* 3. Did you subsequently have any conversation with said Griswold, in which said bond or bonds were spoken of? If so, state when, where, and what was said on that subject:

"*Ans.* About the last of October, or the first of November, 1868, along that time, I met Mr. Griswold on Thames Street, in Newport, near my office. He spoke of this bond as if it were a bail bond. I said, "No; it is a bond upon which you may be liable to pay money. If, for example, the court should find a judgment against Durant for any sum of money, and he did not pay it, you could be held for the amount named in these bonds.' He said, 'Well, I guess you are right, but I must see Durant about it. He must do something about it.' I asked him, 'Why, he is rich enough, isn't he?' and Mr. Griswold said, 'Yes; he is rich enough, but he is reckless, and there is no telling how long such a man may stay rich, and he must give me security.' I would like to add here that I mentioned this to Mr. Honey last winter. Mr. Honey said that he was confident, from conversations he had had with his client, Mr. Griswold, that Mr. Griswold had no recollection of any such conversation with me; and I replied that if Mr. Griswold did not recollect it, I should hesitate about swearing to it, and that I did not think I would swear to it under those circumstances, and that certainly I would not like to do so. Still I have felt bound to state it here, upon further reflection, with these explanations."

Griswold, on being recalled, was interrogated in reference to this interview, and his answer is as follows (ans. 6, Record, p. 58):

"I have no distinct recollection of the interview referred to. I do not remember having stated my belief that it was a bail bond, *as stated by Mr. Peckham*, but on that or no other occasion have I ever admitted that it was other than a bail bond."

It is thus manifest that the claim of Hazard and his counsel, that this was a *bond for the payment of money*, was made known to Griswold at this early period — less than three months after the bond itself was given. If he did not acquiesce, and intend to acquiesce, in that claim, and especially if he intended to set up that said bond had been obtained from him by fraud or mistake, it was his duty immediately, and without any delay, to have taken steps to set the matter right. On the contrary, he allowed nearly thirteen years to elapse before bringing this suit. Twelve years after giving the bond, he practically asserted its validity, and prayed to be discharged from it by placing Durant within the jurisdiction of the court. In his petition there was "*no suggestion of any fraud, imposition or unfairness in obtaining it, practised by the complainants on the defendant* [Durant] *or his sureties.*" Griswold, Petitioner, 13 R. I. 126.

In the mean time, as we have already shown by reference to the testimony of Bradley and Peckham, this bond in three instances was before the Supreme Court of Rhode Island, and the subject of discussion, namely, in November, 1868, in 1869, and in 1870; and in each instance it was respectively claimed and conceded that the bond was valid as a bond for the payment of money, and the Court was led to act upon that assumption. These facts of themselves constitute a complete answer to the plaintiff's case.

Grymes *v.* Sanders, 93 U. S. 55, 60, 62.

WANT OF PARTIES.

Durant, being the principal in the bond which this bill seeks to alter, was a necessary party defendant, and no decree altering or affecting his liability under that instrument can be rendered in his absence.

Shields *v.* Barrow, 17 How. 136.

"Although a necessary party is *ex re*, still the court cannot proceed to enter a decree in his absence, and the bill must be dismissed."

Coiron *v.* Millaudon, 19 How. 113.
Hagan *v.* Walker, 14 How. 36.
Greene *v.* Sisson, 2 Curtis R. 171.